APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED SEPTEMBER 18, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: April 27, 2000 Decided: SEP 18 2000)

Docket No. 99-7898

STEVEN GRAVATT and DELORES GRAVATT,

Plaintiffs-Appellees,

– v. –

THE CITY OF NEW YORK,

Defendant-Cross-Claimant,

SIMPSON & BROWN, INC.,

Defendant-Cross-Defendant-Appellant,

N. MASSAND, P.E., L.S., P.C.,
a/k/a/ Nanik Massand, P.C.,

Defendant-Cross-Claimant-Cross-Defendant,

BARGE "ABC" and BARGE "DEF", their Engines,
Boilers, Tackles, etc. *in rem*,

Defendant-Cross-Defendant.

Appendix A

Before: JACOBS, LEVAL and SACK, *Circuit Judges*.

* * *

LEVAL, *Circuit Judge*:

Defendant Simpson & Brown, Inc. ("S&B") appeals from the final judgment of the United States District Court for the Southern District of New York (Robert W. Sweet, *Judge*) entered against it on July 6, 1999. Plaintiff Steven Gravatt ("Gravatt") was employed as a journeyman dock builder by defendant S&B — the sole appellant — a construction contractor retained by the City of New York to repair one of its bridges. Gravatt was injured while working on a barge chartered by S&B at this mid-river construction site. Gravatt's employment made him a "harbor-worker" — a person covered by the terms of the Longshore and Harbor Workers' Compensation Act of 1972 ("LHWCA"), as amended, 33 U.S.C. §§ 901 *et seq*. Under the definitions of the LHWCA, S&B acted in two capacities — first, as Gravatt's employer, *see* 33 U.S.C. § 902(4), and second, as the owner of the vessel on which Gravatt was injured, *see id.* § 902(21).

We must decide whether S&B's conduct renders it liable to Gravatt in tort given that it acted in this dual capacity of employer and vessel owner. The LHWCA provides that as Gravatt's employer, S&B was required to pay Gravatt statutory compensation for injuries suffered in the course of his employment, regardless of fault, *see* 33 U.S.C. § 904, but that an employer's no-fault liability for compensation to its employee under section 904 is "exclusive and in place of

all other liability." *Id.* § 905(a). Therefore, Gravatt has no tort remedy against S&B in its capacity as his employer. On the other hand, the injured employee's receipt of compensation from his employer does not bar him from suing responsible third parties. *See* 33 U.S.C. § 933(a). In this regard, the LHWCA provides that, with certain exceptions, an injured maritime worker may bring an action for negligence against a vessel as a third party. *See* 33 U.S.C. § 905(b). The statute implies, and has been interpreted to provide, that an employer that is also a vessel owner can be liable to its employees as if it were a third party for negligence in its vessel capacity. We must decide how to reconcile S&B's section 905(a) immunity as employer to suit in negligence, with its potential liability in negligence as a vessel under section 905(b).

The district court found Gravatt liable under alternate theories. First, relying on its reading of *Fanetti v. Hellenic Lines Ltd.*, 678 F.2d 424 (2d Cir. 1982), it concluded that S&B was liable in negligence to Gravatt regardless "whether the acts of negligence are attributable to the owner-employer in its capacity as [vessel] owner or as employer." *Gravatt v. City of New York*, 53 F. Supp. 2d 388, 424 (S.D.N.Y. 1999). Second, the district court found that S&B's negligence was in its capacity as vessel owner. *See id.* at 421-24. In our view, a dual-capacity employer-vessel is liable to its covered employees under section 905(b) only to the extent that it breached its duties of care in its capacity as vessel, and is not liable for negligence committed in its capacity as employer. *Accord Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603 (1st Cir. 1996) (en banc); *Levene v. Pintail Enters.*, 943 F.2d 528 (5th Cir. 1991); *Castorina v. Lykes Bros. S.S. Co.*,

758 F.2d 1025 (5th Cir. 1985); *see also Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789, 795 (2d Cir. 1979) (holding that the "key issue" in a dual-capacity case was whether negligent employees acted "in their capacity as agents of the vessel on the one hand or as employees performing [LHWCA-covered harbor work] on the other"). Because we find that S&B was not negligent in its vessel capacity, we reverse the judgment against S&B.[1]

BACKGROUND

A. Facts

The facts of the case are set out in detail in the several opinions below, in particular the court's opinion on the parties' summary judgment motions, *see Gravatt v. City of New York*, No. 97 CIV 0354(RWS), 1998 WL 171491 (S.D.N.Y. Apr. 10, 1998), and in two post-trial opinions, *see Gravatt v. City of New York*, 1999 WL 111922 (S.D.N.Y. Mar. 3, 1999) ("Original Opinion"); *Gravatt v. City of New York*, 53 F. Supp. 2d 388 (S.D.N.Y. 1999) ("Revised Opinion"). The following facts relevant to this appeal are as found by the district court.

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1. Because we conclude that S&B was not liable in negligence under section 905(b) and reverse the judgment, we need not reach the other arguments S&B raised on appeal regarding: (1) S&B's entitlement to a judgment credit to reflect the payments the Gravatts received in their post-judgment settlement with codefendants the City of New York and N. Massand, P.C.; (2) whether punitive damages may be awarded in suits brought under section 905(b); and (3) whether Gravatt was contributorily negligent.

Appendix A

Gravatt and his wife Delores sued the City of New York (the "City"), N. Massand, P.C. ("Massand"), and S&B for injuries that Gravatt sustained in an accident on January 31, 1996, while he was working on a construction project repairing the 145th Street Bridge across the Harlem River. The City owned the bridge. Massand — a New York professional corporation — was the engineering firm retained by the City to design the bridge repair project, supervise the construction, and monitor that the repair work was carried out safely. S&B was the construction contractor hired to perform the repair work under the supervision and control of Massand and the City. Gravatt was employed by S&B.

The repairs to the 145th Street Bridge involved the demolition and replacement of the bridge's "fender systems" — the wooden, pier-like structures that surround a bridge's mid-river stanchion in order to protect it in case of collision with shipping. The repairs required the removal of the old fender system, the excavation of the river-bed, and the driving of new piles, on which the new fender system could be constructed. This mid-river construction work required the use of several barges, which S&B had chartered to perform the work. A crane barge carried the heavy equipment used to extract the old piles, drive new piles, and excavate the river-bed. Materials barges were used to transport new materials, consisting primarily of piles, braces and whalers to the site from Newark, New Jersey, and to transport debris — primarily old timbers — to Newark for disposal. The crane was used to unload new materials from the materials barges and to load them with debris. When a barge loaded with new materials arrived at the site, it would be lashed to the crane barge. As work progressed, the new materials would be

offloaded from the barge and debris loaded in their place. When this was accomplished, the materials barge would be towed back to Newark to dispose of the debris and repeat the cycle.

Gravatt's duties as a dock builder required him to spend nearly all his time working directly on the fender system of the bridge. He spent less than one percent of his time on the barges.[2] His normal duties did not include handling materials on the barges. The discharging of the new materials and the stowing of the debris on the barges was usually performed by a "deck man."

On January 31, 1996, however, Gravatt, together with a fellow dock builder, Liming, was instructed by the site foreman Holzheuer to go onto a materials barge to help move old piles so as to clear access to new materials. The debris had been loaded on top of new materials, obstructing access to them. The loading of debris on top of new materials violated S&B's safety policies as set out in its safety handbook. This storage decision had been Holzheuer's. It is not disputed furthermore that Holzheuer instructed Gravatt and Liming to move the old piles in an unsafe and negligent manner. Standard industry practice requires the use of a "choker" to move piles. A "choker" is a chain, which is wrapped around the pile, the noose tightening as the crane

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2. For this reason the district court correctly dismissed Gravatt's claims under the Jones Act, concluding that Gravatt had an insufficiently substantial connection to a vessel in navigation to qualify as a seaman under the standard set out in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). *See Gravatt v. City of New York*, 1998 WL 341941, at *5-*6 (S.D.N.Y. June 26, 1998).

lifts the chain. "Timber tongs" are used to raise the pile two or three feet onto a "sleeper," which provides enough clearance from the deck to allow the choker to be attached around the pile. Holzheuer, however, instructed Gravatt and Liming to use the timber tongs, rather than the choker, to move piles. There was evidence that S&B routinely engaged in this misuse of timber tongs, in violation of industry-wide safety standards.[3]

Gravatt and Liming stood on the material barge. The crane operator and deck man were on the crane barge. The crane barge was secured to the fender system; the material barge was lashed to the crane barge. The crane operator could not see Gravatt who stood on the debris material some 60 to 70 feet away from him. Gravatt climbed over the debris to attach the timber tongs to a twelve-foot piling. Liming gave a signal, which the crane operator interpreted as a signal to hoist. Liming did not use the signals specified in S&B's safety handbook.

At this point Gravatt had climbed back onto the new lumber, some eight feet above the deck of the barge, and was facing away from the raised piling. As the crane raised the pile some 10 feet into the air, the lower end of the pile snagged on debris on the barge. The pile slipped from the teeth of the timber tongs, and fell, hitting another pile, which

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3. The district court concluded that this "use of timber tongs . . . violated an industry-wide safety standard. It also violated § 1981.81 of OSHA, 29 CFR § 1981.81, as well as [New York State] Industrial Code §§ 23-1.5(c)(2), 23-2.1, 23-3.3(k), 23-6.1(d), 23-6.1(e), 23-8.1(e)(3), 23- 8.1(f)(1)(iv), 23-8.1(f)(2)(ii), and 23-8.2(c)(3)." *Gravatt*, 53 F. Supp. 2d at 417.

bounced up and struck Gravatt on the back of his legs. Gravatt was knocked some twenty-five feet into the near-freezing water of the Harlem River.

Gravatt was seriously injured and has undergone several operations on his legs. He has received the statutory compensation payments from S&B due under the LHWCA.

B. Relevant Prior Proceedings

A bench trial was held from November 30 through December 4, 1998. On March 3, 1999, the district court issued an opinion ruling in favor of the Gravatts on their state labor law claims against the City and Massand, pursuant to N.Y. Labor Law §§ 200(1), 240, 241(6), and on their federal claim against S&B, pursuant to section 5(b) of the LHWCA, 33 U.S.C. § 905(b). *See Gravatt*, 1999 WL 111922, at *21-*31. Gravatt was held to have been one-third contributorily negligent. *See id.* at *19, *32. The court awarded punitive damages against Massand, but held that punitive damages could not be awarded against S&B as a matter of law under the LHWCA. *See id.* at *33.

The Gravatts filed a motion to amend, pursuant to Fed. R. Civ. P. 52(b). On May 24, 1999, the district court granted the motion and filed a revised opinion. *See Gravatt*, 53 F. Supp. 2d 388. The revised opinion reversed the court's rulings that Gravatt was contributorily negligent, *see id.* at 392-94, and that punitive damages were not available in a tort action under section 905(b), *see id.* at 394-397.

Judgment was entered on July 6, 1999, in favor of Gravatt and his wife against S&B in the total amount of

$2,254,857.48, plus post-judgment interest and costs. As against Massand and the City a similar judgment was not reduced to a single amount, but was structured pursuant to New York's structured judgment statute, *see* N.Y. CPLR 50-B, which requires that part of the judgment be paid out over time. The three defendants were held jointly and severally liable for all amounts due under the judgment, with the exception of the punitive damages entered separately against Massand and S&B, for which they were held severally liable.

After the judgment was entered, on July 16, 1999, the City and Massand settled with the Gravatts, paying $1,350,000 in exchange for general releases from the Gravatts and a partial satisfaction of judgment. S&B then moved pursuant to Fed. R. Civ. Proc. 59(e) to amend the July 6 judgment entered against it by reducing the judgment by the $1,350,000 received by the Gravatts in their settlement with the City and Massand. On November 5, 1999, the district court denied the motion. *See Gravatt v. City of New York*, 73 F. Supp. 2d 438, 440-41 (S.D.N.Y. 1999).

S&B appeals from the judgment and from the order denying its Rule 59(e) motion to amend the judgment. We reach only the issue whether S&B was liable under section 905(b).

DISCUSSION

S&B contends on appeal that the district court improperly held it liable for vessel negligence under LHWCA § 5(b), 33 U.S.C. § 905(b). It does not dispute that it was negligent in its capacity as employer and that Gravatt was

injured by reason of that negligence,[4] but denies it was negligent in its capacity as vessel owner. The district court held S&B liable under alternate theories. First, citing *Fanetti v. Hellenic Lines Ltd.*, 678 F.2d 424 (2d Cir. 1982), the court ruled that any negligence on the part of a dual-capacity employer-vessel owner is actionable under section 905(b), regardless whether the negligence was committed in its capacity as vessel owner or in its capacity as employer. *See Gravatt*, 53 F. Supp. 2d at 424. Second, citing *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603 (1st Cir. 1996), and *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789 (2d Cir. 1979), the district court found that, in any case, S&B was negligent in its vessel capacity. *See Gravatt*, 53 F. Supp. 2d at 421-24. S&B argues that its negligence was only in its role as Gravatt's employer and not in its role as vessel owner, and that, as Gravatt's employer, its liability was limited to the statutory workers' compensation payments required by the LHWCA. *See* 33 U.S.C. §§ 904, 905(a). We agree that S&B can be held liable under 905(b) only for negligence in its role as vessel and that no such negligence was shown. We therefore reverse the judgment.

1. Vessel liability under section 905(b) of the LHWCA.

LHWCA is a comprehensive workers' compensation system, under which employers are required to compensate covered employees injured in the course of their employment, regardless of fault. In relevant part, section 4 of the LHWCA provides:

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4. It has been undisputed throughout that S&B's conduct was negligent. *See, e.g., Gravatt*, 1998 WL 171491, at *10 n.2 ("The [hoisting] procedure adopted was unsafe and recognized to be so.").

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. . . .[5]
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury.

33 U.S.C. § 904. It is not disputed that Gravatt's employment was as a "harbor-worker" covered by the LHWCA, *see* 33 U.S.C. § 902(3),[6] and that S&B was his "employer," *see id.* § 902(4).[7]

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5. In turn, section 907 sets out in detail the employer's obligations to provide certain medical services and supplies "for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). Section 908 sets out a detailed schedule of payments that the employer must make in the case of permanent total, temporary total or permanent partial disability. *See id.* § 908. Section 909 sets out a schedule of death benefits and specifies the beneficiaries to whom they are payable in the event that an employee's injury is fatal. *See id.* § 909.

6. "The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . ." 33 U.S.C. § 902(3). The term does not include certain employees "subject to coverage under a State workers' compensation law," *id.* § 902(3), including "master[s] or member[s] of a crew of any vessel." *Id.* § 902(3)(G).

7. "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in

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Like most state workers' compensation schemes, the LHWCA provides that the statutory, no-fault compensation payments are the employer's exclusive liability to its employees when they are injured in the course of their employment. "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . ." 33 U.S.C. § 905(a). The employee is, therefore, barred from suing his employer in tort. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 394 n.11 (1970). On the other hand, as with most state workers' compensation schemes, the employee may sue negligent third parties in tort, notwithstanding his entitlement to no-fault compensation provided by the employer. *See* 33 U.S.C. § 933(a) ("If . . . the person entitled to . . . compensation determines that some person other than the employer . . . is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."). In particular, under section 905(b), in accordance with section 933, an employee may bring an action in negligence against the "vessel as a third party." 33 U.S.C. § 905(b). It is undisputed that S&B, as owner or charterer of the crane barge and charterer of the materials barges, falls within the statutory definition of "vessel." *See* 33 U.S.C. § 902(21).[8]

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part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." 33 U.S.C. § 902(4).

8. "[T]he term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this (Cont'd)

Appendix A

The question presented by this case is whether, and under what circumstances, S&B can be liable to its employee for its negligence given its dual-capacity as employer (enjoying immunity from tort liability under section 905(a)) and vessel owner (against which liability for negligence may lie under section 905(b)).

This question requires an understanding of the significant amendments to the LHWCA enacted by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (hereafter "1972 Amendments"). Prior to 1972, the exclusivity of the employer's liability under section 905 had been severely undermined as a result of two Supreme Court decisions. *See generally* H.R. Rep. No. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698. First, in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 95-96 (1946), the Supreme Court held that longshoremen and other employees covered under the LHWCA, who were injured while working on a vessel, were entitled to maintain an action against the vessel, as a third party, based on the theory of unseaworthiness — a doctrine of strict liability. Under *Sieracki*, vessels were liable as third parties to longshoremen for injuries resulting from the vessels' "unseaworthy" condition. An action for unseaworthiness had previously been available only to seamen.[9] Because the responsibility of a

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chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U.S.C. § 902(21).

9. Longshoremen thus came to be described as "*Sieracki*-seamen."

vessel to be in seaworthy condition calls for strict liability, regardless of fault, the vessel could be liable to longshoremen, notwithstanding that the unseaworthy condition may have been caused by the stevedore and not by the vessel's crew. *See* H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4702; *see also Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 164-65 (1981).

Second, in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 132-35 (1956), the Supreme Court held that the vessel could seek indemnity from the stevedore-employer for the vessel's liability to an injured longshoreman-employee for unseaworthiness, based on the theory that the stevedore had breached an express or implied warranty of workmanlike performance to the vessel. In this manner, the stevedore-employer became indirectly liable in maritime tort to its injured longshoreman-employee under the no-fault doctrine of unseaworthiness, notwithstanding that the LHWCA provided that the stevedore-employer's exclusive liability to its injured employees was for the statutory compensation payments. *See* 33 U.S.C. §§ 904, 905(a). In effect, the injured employee could get tort damages from his employer despite the statutory proscription against suing his employer directly.[10]

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10. Lastly, by 1972, the incentive to sue the vessel for unseaworthiness, and thereby impose this liability indirectly on the stevedore, was especially great because the maximum compensation available under the LHWCA had not been increased for 12 years. As a result many workers received statutory disability benefits under the LHWCA "as low as 30% of their average weekly wage." H.R. Rep. 92-1441, 1972 U.S.C.C.A.N. at 4700.

Appendix A

The 1972 Amendments made substantial changes to this framework. The statutory compensation benefits provided under the LHWCA were substantially increased. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 261-62 (1977). At the same time, section 5(b) of the LHWCA, 33 U.S.C. § 905(b), was amended to overrule *Sieracki* and *Ryan*. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 (1979). The longshoreman-employee's right to recover for unseaworthiness was abolished; his right to recover from the vessel was preserved but was limited to an action for negligence; and the vessel owner's right to indemnity from the stevedore was abolished. *See Scindia*, 451 U.S. at 165. Under these amendments, section 905(b) provided in relevant part:

> In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing

> shipbuilding or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

33 U.S.C. § 905(b) (as in effect in 1972).

In two respects, these 1972 Amendments expressly addressed the dual-capacity problem that arises where the covered maritime worker is employed by the owner of the vessel on which (or by which) he is injured, rather than employed by a contractor that is independent of the vessel. *See* H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4705. The second sentence of § 905(b) relieves a dual-capacity vessel of negligence liability to a worker "employed by the vessel to provide stevedoring services . . . if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." Similarly, the third sentence of section 905(b), as in effect in 1972, provided that a person employed directly by the vessel to provide shipbuilding or repair services had no cause of action against the vessel for injuries caused by the negligence of others providing the same services. *See id.* In 1984, Congress further amended section 905(b) (the "1984 Amendments") to broaden the vessel's immunity from liability for negligence in the case of certain classes of employees. As the result of this amendment, the third sentence of Section 905(b) now provides that:

> If such person was employed–to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer.

Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 5(a)(1), 98 Stat. 1639, 1641. Thus, under the 1984 Amendments, maritime workers engaged directly by a vessel owner to provide shipbuilding, repairing or breaking services cannot sue the dual-capacity employer for injuries caused by the negligence of the vessel or its employees, no matter what were the work activities of the negligent employees.

In amending section 905(b) Congress clearly intended that the "vessel's liability is to be based on *its own negligence*." *See* H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4704 (emphasis added); *see also id.* ("The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore."). However, Congress "did not specify the acts or omissions of the vessel that would constitute negligence." *Scindia*, 451 U.S. at 165. The House Committee Report on the 1972 Amendments conceded that the contours of the action for vessel negligence under 905(b) were to be worked out by federal courts "through the application of accepted principles of tort law and the ordinary

process of litigation — just as they are in cases involving alleged negligence by land-based third parties." H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4704. At the same time, through the Committee Report, Congress provided substantial guidance as to the principles that should shape the evolution of the action.

First, the House Committee specified that the employee's rights and the vessel's liability under a 905(b) action for vessel negligence should approximate those of a land-based employee and a land-based third party.

> The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that *the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances.*

H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4704 (emphasis added).

Second, the 905(b) action was to be developed as a matter of uniform federal maritime law, not by incorporating the tort law of the particular state in which the action arose. *See id.* at 4705 ("[T]he Committee does not intend that the [section 905(b) action] shall be applied differently in different ports depending on the law of the State in which the port

may be located . . . [but] that legal questions . . . shall be determined as a matter of Federal law."). In particular, the Report specified that

> the Committee intends that the admiralty concept of comparative negligence, rather than the common law rule as to contributory negligence, shall apply in cases where the injured employee's own negligence may have contributed to causing the injury. Also, the Committee intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable.

Id. at 4705.

Third, by eliminating the no-fault action of unseaworthiness against the vessel and increasing the level of statutory compensation recoverable from the employer, the 1972 Amendments intended "to shift more of the responsibility for compensating injured longshoremen to the party best able to prevent injuries: the stevedore-employer." *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 97 (1994); *see also* H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4699 ("[A]dequate workmen's compensation benefits[,] . . . by assuring that the employer bears the cost of unsafe conditions, serve[ ] to strengthen the employer's incentive to provide the fullest measure of on-the-job safety."). Recognizing that Congress conceived statutory compensation payments "as the usual source of making the [covered employee] whole," we have cautioned that "[c]ourts must be exceedingly careful in defining the contours of the

[covered employee's] action for negligence against the ship . . . lest too expansive notions of the ship's duty vitiate Congress' intent to do away with absolute liability for vessels . . . and make greatly improved compensation benefits the primary remedy for longshoremen and harbor workers." *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 688, 687 (2d Cir. 1978) (Friendly, *J.*, dissenting).

Fourth, and important for our case, the Report specifies as to "dual-capacity" cases,

> *the rights of an injured longshoreman . . . . should not depend on whether he was employed directly by the vessel or by an independent contractor.* Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. . . . *The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen . . . as apply when an independent contractor employs such persons.*

H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4705 (emphases added). As the Supreme Court has concluded, under the 1972 Amendments, "all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and . . . all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself." *Edmonds v. Compagnie*

Generale Transatlantique, 443 U.S. 256, 266 (1979). While the *Edmonds* opinion focused on longshoremen, it is clear that Congress intended a general principle that the rights and liabilities of employee and employer should not turn on whether the employer acted in a dual-capacity as vessel owner. *See, e.g., Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789, 795 (2d Cir. 1979) (observing in context of non-stevedoring case that "the legislative history of the 1972 amendments makes it clear that the rights of an employee are not dependent on who the employer is").

It is not disputed that an employee of a dual-capacity employer-owner retains his right to sue the vessel for negligence under section 905(b). Even before the 1984 Amendments, the Supreme Court held unanimously in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), that a longshoreman, injured on a vessel during the course of his employment, could bring a section 905(b) negligence suit against the vessel, notwithstanding that the owner was also his employer, from whom he had already received statutory compensation pursuant to section 904. The Court found that the language of section 905(b) compelled this result. It reasoned that if section 905(a) had been intended to bar *all* employee suits against dual-capacity employers for third-party vessel negligence there would have been no need to insert the language expressly barring such actions where the injury was caused by the negligence of a fellow worker " 'engaged in providing stevedoring services to the vessel.' " *Jones & Laughlin*, 462 U.S. at 530 (quoting 33 U.S.C. § 905(b)). By expressly delineating the circumstances in which a dual-capacity vessel may *not* be sued for its negligent injury to its covered employee, section 905(b) implies that

the vessel may be sued for negligence by its covered employees in circumstances falling outside the specified exceptions. In further support of its holding, the *Jones & Laughlin* Court cited the unequivocal language of the 1972 Committee Report, quoted *supra* at **[page 16]**, indicating that the rights and liabilities of employee and employer should not depend on whether the employee was employed directly by the vessel or by a stevedoring contractor. *See Jones & Laughlin*, 462 U.S. at 531-32 (quoting H.R. Rep. No. 92-1441, 1972 U.S.C.C.A.N. at 4705).

The Supreme Court's textual argument in *Jones & Laughlin* is even more compelling after the 1984 Amendments, which barred employees providing "shipbuilding, repairing, or breaking services" from bringing a negligence action against a dual-capacity employer-vessel owner in *any* circumstances. 33 U.S.C. § 905(b) (as amended by Pub. L. No. 98-426, § 5(a)(1), 98 Stat. 1639, 1641). As we concluded in a case heard after the 1984 Amendments, "[t]he 1984 change . . . shows that Congress knew how to preclude a class of employees from being able to sue an employer-vessel if it chose to do so." *Guilles v. Sea-Land Serv., Inc.*, 12 F.3d 381, 386 (2d Cir. 1993); *see also* H.R. Rep. No 98-570(I), *reprinted in* 1984 U.S.C.C.A.N. 2734, 2741 ("The Committee intends that this language [in section 905(b)] not be construed to limit an employee's right to bring a cause of action, except in the circumstances indicated within the language.").

The *Jones & Laughlin* Court recognized, however, that section 905(b) "does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its

'owner' capacity, not for negligence in its 'stevedore' capacity." *Jones & Laughlin*, 462 U.S. at 531 n.6. While the last clause, excluding liability for negligence "in its 'stevedore' capacity," is *dictum*,[11] this conclusion is the logical result of the text and structure of the statute, and comports with the instruction of the legislative history. Insofar as the employer-vessel is negligent in its stevedore-employer capacity, it is immune from suit under section 905(a). However, insofar as it is negligent in its vessel capacity, it will be liable under section 905(b) in the same manner as a third party. This bifurcated approach gives effect to the express legislative intent that the rights and liabilities of employer, employee and vessel be affected as little as possible by the happenstance of whether the employee is employed by an independent contractor or by the owner of the ship.

2. *A vessel's duties of care.*

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), the Supreme Court examined the issue of a vessel's duties of care under section 905(b) in the context of the classic triangular relationship among a vessel owner, an independent stevedoring contractor and an injured longshoreman employed by the stevedore. A longshoreman

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11. Plaintiff Pfeifer, a longshoreman, slipped and fell on a barge owned by his employer, which had "negligently failed to remove [snow and ice] from the gunnels." *Jones & Laughlin*, 462 U.S. at 526. The only issue of liability before the Supreme Court was whether Pfeifer's suit was precluded by the exclusive liability language of section 905(a). The defendant did not contest that its negligence was attributable to it in its capacity as vessel owner.

employed by an independent stevedoring contractor was injured when he was struck by cargo falling from a pallet. The pallet was suspended from a crane, which while undisputedly part of the vessel's gear, was operated by a fellow longshoreman also employed by the stevedore. It was alleged that the ship's crane had been malfunctioning for two days before the accident. At issue was (1) whether the cargo had fallen because the winch's braking mechanism had slipped due to the alleged malfunction; and (2) whether the vessel owner knew or should have known of the winch's faulty condition and had a duty to warn the stevedore and its employees of this hazardous condition. Finding no duty, the district court had entered summary judgment for the ship. The Court of Appeals vacated and remanded for trial. *See Scindia*, 451 U.S. at 159-64. The Supreme Court affirmed. *See id.* at 179. However, the Supreme Court disagreed with the court of appeals's conclusion that the vessel owner owed a continuing duty to inspect the vessel's gear, once the vessel had been turned over to the stevedore in safe condition. *See id.* at 451 U.S. at 163, 172. While noting the legal duties placed on the stevedore under section 41 of the LHWCA, 33 U.S.C. 941,[12] and the vessel's justifiable expectation that the stevedore will perform those duties, *see Scindia*, 451 U.S. at 176, the Supreme Court articulated three duties that defined the scope of the vessel's duty of care in the classic tripartite situation under section

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12. Section 941(a) requires that "[e]very employer shall furnish and maintain employment and places of employment which shall be reasonably safe for his employees in all employments covered by this chapter" and authorizes the Secretary of Labor to determine by regulation particular "devices . . . safeguards . . . and working conditions." 33 U.S.C. § 941(a).

905(b). These have become known as the "*Scindia* duties." *E.g.*, 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 442 (2d ed. 1994).

First, before turning over the ship or any portion of it to the stevedore, the vessel owner must exercise "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety." *Scindia*, 451 U.S. at 167. As part of this duty, the vessel owner must also warn the stevedore of hidden dangers that could not be discovered through the exercise of reasonable care. *See id.* This set of obligations is usually referred to as the "turnover duty." *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 98 (1994).

Second, once stevedoring operations have begun, the vessel will be liable "if it actively *involves* itself in the cargo operations and negligently injures a longshoreman." *Scindia*, 451 U.S. at 167 (emphasis added). A passive vessel owner has no ongoing duty to supervise or inspect the stevedore's work — absent contractual, regulatory or customary obligations to the contrary. *See id.* at 172. However, even where the vessel does not actively involve itself in the stevedoring operations, it may be liable "if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the *active control of the vessel* during the stevedoring operation." *Id.* at 167 (emphasis added). Therefore, the vessel must take care to prevent unreasonable hazards in areas of the vessel under its direct control. These related obligations arising either from the vessel's "active involvement" in cargo

operations or its "active control" of areas of the vessel encountered by longshoremen are commonly known as the "active control duty." *E.g.*, *England v. Reinauer Transp. Cos.*, 194 F.3d 265, 270 (1st Cir. 1999); *see also Howlett*, 512 U.S. at 98.

Third, *Scindia* articulated an exception to the generally limited duties imposed on the vessel once operations have begun. With respect to obvious dangers in areas under the principal control of the stevedore, the vessel owner must intervene if it acquires actual knowledge that (1) a condition of the vessel or its equipment poses an unreasonable risk of harm and (2) the stevedore is not exercising reasonable care to protect its employees from that risk. *See Scindia*, 451 U.S. at 175-76. It was on this theory of liability that the plaintiff-longshoreman in *Scindia* may have been entitled to go to a jury. If the vessel knew of the dangerous condition of the winch and the "improvident" failure of the stevedore to protect its employees from that known hazard, the vessel was under a "duty to intervene." *Id.* at 175-77; *Howlett*, 512 U.S. at 98.

3. *The application of Scindia to dual-capacity cases not involving stevedoring operations.*

In *Jones & Laughlin*, the Supreme Court instructed that a covered employee may bring a section 905(b) action for negligence against a dual-capacity defendant in its vessel owner capacity; however, the Court has not yet explained how to distinguish between the employer responsibility and the vessel responsibility. *See Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603, 605 (1st Cir. 1996) (en banc). Nor has the

Court yet explained how the principles it set out in *Scindia* apply to claims brought by non-stevedoring harbor workers covered under the LHWCA against a vessel owned by their own employer. This case presents the question how to define a dual-capacity defendant's negligence in its role as vessel, so as to distinguish such actionable negligence from its non-actionable negligence in its role of construction contractor employing covered harbor workers.

As noted, *Scindia* defined the vessel's duty of care in the context of the traditional arrangement of stevedoring operations involving the triangular relationship of vessel, independent stevedore-employer, and longshoreman employee. *See also Howlett*, 512 U.S. at 96 (suggesting that this is the typical relationship in the longshoring business); *Jones & Laughlin*, 462 U.S. at 528 ("Most longshoremen who load and unload ships are employed by independent stevedores, who have contracted with the vessel owners to provide such services."). This case presents two variations from that fact pattern. First, Gravatt was a dock builder — a harbor worker covered under the LHWCA but not a longshoreman. Second, S&B was acting as a dual-capacity employer-vessel. The Supreme Court has not addressed the extent to which Scindia's analysis defines the vessel's duties to LHWCA-covered harbor workers not engaged in longshoring operations; nor has it ruled on how *Scindia* applies in dual-capacity cases. *See Morehead*, 97 F.3d at 611.

As to the first question, lower federal courts have generally held that *Scindia* provides the appropriate point of departure for analyzing a vessel's liability in a section 905(b) action brought by non-longshoring harbor workers.

See, e.g., Morehead, 97 F.3d at 613 (applying *Scindia* in a case concerning a bridge construction worker); *Elberg v. Mobil Oil Corp.*, 967 F.2d 1146, 1149-51 (7th Cir. 1992) (affirming district court's application of *Scindia* analysis to define scope of vessel duties to welder employed by ship repair company); *Levene v. Pintail Enters.*, 943 F.2d 528, 533-36 (5th Cir. 1991) (applying *Scindia* analysis where harbor worker was heavy equipment operator who was injured on the deck of another owner's barge); *Teply v. Mobil Oil Corp.*, 859 F.2d 375, 377 (5th Cir. 1988) (noting in principle that *Scindia*'s analysis of scope of vessel liability under section 905(b) "applies to other harborworkers who work on board vessels as well" and applying analysis to worker employed by independent contractor who was injured on an oil well accessible only by barge); *Cook v. Exxon Shipping Co.*, 762 F.2d 750, 752 (9th Cir. 1985) (holding that *Scindia* duties "apply to employees of independent repair companies who are working on a vessel"); *Hill v. Texaco, Inc.*, 674 F.2d 447, 451 (5th Cir. 1982) (applying *Scindia*'s analysis where plaintiff harbor worker was employee of repair contractor hired to inspect storage tanks of oil tanker for rust).

The more troublesome question, however, is how *Scindia*'s instruction regarding the scope of the vessel's duties in the tripartite situation of employee, independent employer and third-party vessel is to apply to the dual-capacity case, where the LHWCA provides that the employer-vessel owner is immune from suit for negligent conduct in its "employer" capacity, *see* 33 U.S.C. § 905(a), but liable for suit under section 905(b) for negligence in its "owner capacity." *Jones & Laughlin*, 462 U.S. at 531 n.6.

The relationship seems clear as to the first prong of the *Scindia* duties — the "turnover duty." If because of negligence of the ship's crew, the vessel's equipment is faulty, or hidden dangers beset the contracted operation, so that an experienced contractor could not safely carry out its operations, such negligence would seem to constitute negligence in the capacity as vessel and render the ship liable whether the contracting operations were carried out by an independent stevedore or by the same entity as owns the vessel.[13]

The application of *Scindia*'s second and third prongs — the active control duty and the duty to intervene upon actual knowledge — to the circumstance where the harbor-work contractor and the owner of the vessel are the same entity is more problematic. Where the contracted service is performed by employees of the entity that owns the vessel, by definition the vessel owner would have "actively involved" itself in the operation and would have "actual knowledge" of the failure of the personnel undertaking the

13. We use the example of stevedoring operations to illustrate the issues involved in applying *Scindia*'s analysis to the dual-capacity employer-vessel owner. The vessel-stevedore-longshoreman relationship is intended only as a concrete example of any vessel-employer-employee relationship that may arise under the LHWCA's definition of those terms. *See* 11 U.S.C. § 902(3), (4), (21); *cf. Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 687 n.1 (2d Cir. 1978) (Friendly, *J.*, dissenting). In our case, the relationship is between vessel (S&B *qua* vessel), construction contractor (S&B *qua* employer) and dock builder (Gravatt). The question of how *Scindia* applies outside the context of stevedoring operations is analytically distinct from the question of how it applies outside the triangular relationship of parties.

task to operate in a manner that protected their coworkers from danger. Thus, if any "active control" or "actual knowledge" on the part of the dual-capacity defendant were sufficient to constitute actionable negligence under section 905(b) — regardless whether the defendant took control or had knowledge in its employer capacity or its vessel capacity — the availability of a tort remedy against the vessel would turn on whether the harbor-working operations were performed by a contractor independent of the vessel or by the same entity that owned the vessel — except in the four circumstances covered by the second and third sentences of section 905(b). Harbor-working employees not within these four specifically excluded categories would have more expansive tort remedies if employed by a dual-capacity employer-vessel owner than they would have if employed by an independent contractor. By the same token, the dual-capacity employer-vessel owner would have greater liabilities than if the work arrangement involved a single-capacity employer and a third-party vessel.[14]

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14. This can be seen by simple example. Suppose covered workers are performing harbor work that is not within the express statutory exclusions, and that the work involves the use of a vessel. One of the workers is injured as the result of another's negligent performance of the work. If those workers were employed by a contractor independent of the vessel, the injured worker is limited to compensation; he has no negligence action against the vessel. If on the other hand, the function is performed by the same entity that owns the vessel, then by definition the vessel's employees will have directly involved themselves in the activities and will have actual knowledge of the unsafe practices being used by the personnel performing the task. Liability of the vessel in tort would follow.

This result would be contrary to the express intent of Congress, which sought generally in drafting section 905(b) to provide the same result regardless whether the covered work was performed by an independent contractor or by the ship through personnel it hired directly to perform it. *See* H.R. Rep. 92-1441, 1972 U.S.C.C.A.N. at 4705.

It therefore appears that the *Scindia* tests for vessel negligence, developed in the context of a tripartite relationship between employee, independent contractor and third-party vessel, cannot fully serve as the test for the negligence of a dual-capacity defendant in its vessel capacity without undermining the intent of Congress that the availability of a section 905(b) negligence action against the vessel should not depend on whether the vessel is owned by a third party or by the employer.

In *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603 (1st Cir. 1996), the First Circuit, sitting en banc, recognized that the liability of vessel owners would be greatly expanded in dual-capacity cases if the knowledge or active control of the dual-capacity defendant acting in its capacity as employer could be imputed to it in its capacity as vessel, thereby exposing it to liability under section 905(b) for breach of the second or third of the *Scindia* duties. *See Morehead*, 97 F.3d at 611. Following the analytical approach previously employed in the Fifth Circuit, *Morehead* ruled that the dual-capacity vessel could be held liable under section 905(b) only to the extent that it breached its *Scindia* duties of care while acting in its capacity as vessel. *See id.* at 613 (following *Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1033 (5th Cir. 1985) (holding that the LHWCA "requires us to separate

the negligence of the shipowner and that of the stevedore, even when the shipowner performs its own stevedoring activities" and that "the duty owed by a shipowner to a longshoreman under section 905(b) is that established by *Scindia* . . . ; this duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel")).

Morehead is particularly instructive for our case because the plaintiff, like Gravatt, was a harbor worker of a type not expressly mentioned in the second and third sentences of section 905(b). *Morehead* recognized that when the vessel owner is also the employer, failure to distinguish between its negligent conduct in its employer capacity, for which it is immune to suit in tort under section 905(a), and its negligence in its vessel capacity, for which it is liable to suit under section 905(b), has the effect of undermining the statutory scheme "by expanding the liability of employers that act simultaneously as vessel owners, when the statute does not call for such a reading and the Supreme Court has cautioned against it." *Id.* at 613. The *Morehead* court concluded that in determining whether the dual-capacity vessel-employer had breached its *Scindia* duties while acting in its vessel capacity, "a court may have to divide the employer-shipowner into a hypothetical independent employer and independent vessel owner, each separately holding the duties allocated under principles suggested in *Scindia*." *Id.*

Plaintiff Morehead was employed as a carpenter on a bridge construction project and a line-handler on a barge used in the construction project. *See id.* at 605. Defendant Atkinson-Kiewit ("A-K"), the construction contractor, was

Morehead's employer, *see* 33 U.S.C. § 902(4), and, as the charterer of the barge, the vessel owner, *see* 33 U.S.C. § 902(21). Morehead was injured on the barge when he stepped into an open hatch. The hatch had been left open negligently by a co-worker, whose regular duties also included both carpentry and linehandling. *See Morehead*, 97 F.3d at 605. Under normal principles of *respondeat superior* the negligence of the co-worker would be imputed to A-K. The court framed the question as whether the negligent act of leaving the hatch open was attributable to A-K acting in its employer capacity, thereby precluding a tort remedy under section 905(a), or acting in its vessel capacity, thereby exposing it to liability in tort under section 905(b). *See id.* at 608. The plaintiff argued that A-K, acting in its vessel capacity, violated the *Scindia* duties it owed him because "at the time he was injured, A-K as vessel (rather than A-K as employer) . . . had 'active control' over or 'actual knowledge' of the open hatch." *Id.* at 614.

The First Circuit rejected the argument. It found that Morehead's co-worker, in opening the hatch, was acting as an agent of his employer not as an agent of the vessel, because the hatch was opened in furtherance of A-K's operations as a bridge builder, rather than in its capacity as vessel owner. *Id.* at 616. It concluded that the barge tended by Morehead and his co-worker were "operated within A-K's control and knowledge *qua employer*." *Id.* at 614. The barge was "analogized to the areas of a vessel taken over by longshore workers in the *Scindia* setting." *Id.* Morehead's co-worker was found to have acted "as Morehead's fellow employee pursuing assigned harbor-worker duties rather than as A-K's agent in its distinct shipowner's capacity." *Id.* at 616. Any

negligence imputed to A-K was therefore attributable to its capacity as employer, for which it was immune from liability in tort under section 905(a).

We agree with that analysis of the application of *Scindia* duties to the dual-capacity employer. Liability in vessel negligence under section 905(b) will only lie where the dual-capacity defendant breached its duties of care while acting in its capacity as vessel owner.[15] The negligent actions of a dual-capacity defendant's employees must be analyzed to determine whether they were undertaken in pursuance of the defendant's role as vessel owner or as employer. The negligence of the employer's agents, acting in tasks constituting harbor-work employment, may not be imputed to their employer in its capacity as vessel owner. Congress's intention is best carried out through analysis of the dual-capacity defendant's allegedly negligent conduct to determine whether it constituted negligence of the defendant in its role as vessel owner, rather than within the scope of its harbor-working activities. If the negligent conduct occurred in the course of activity within the scope of the covered harbor work — such that if a contractor independent of the vessel were performing the work, its liability would have

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15. We also agree with *Morehead* that *Scindia* may be an appropriate starting point for determining the scope of those duties, but recognize that certain harbor-work arrangements "may be so foreign to those in *Scindia*'s stevedoring context that *Scindia*'s analysis [regarding the scope of those duties] will become no more than a point of departure." *Id.* at 613. The central question in each case will be whether the negligence of a dual-capacity defendant is attributable to its capacity as vessel owner or its capacity as employer.

been limited under section 905(a) to statutory compensation payments — then liability should not lie against the vessel under section 905(b) simply because the defendant was both employer and vessel owner.

The approach adopted by the First and the Fifth Circuit comports with our own cases in which we have consistently recognized that Congress did not intend the rights of employees and the liabilities of employers and vessels under the LHWCA to turn on whether the injured employee was employed by an entity acting in the dual capacity of employer and vessel owner. *See, e.g., Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505, 507 (2d Cir. 1976) ("The expressed intent of Congress was that the same principles should apply in determining the liability of a vessel which employs its own longshoremen as apply when they are the servants of an independent contractor."). As a corollary, in dual-capacity cases "in order to determine whether a shipowner-employer may be held liable for damages, a court must decide if the negligence that caused the accident was owner occasioned," and "the key issue is whether the shipowner's employees who were at fault committed the negligent acts in their capacity as agents of the vessel on the one hand or as employees performing longshoring, shipbuilding or repair services on the other." *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789, 795 (2d Cir. 1979) (internal quotation marks omitted).

In summary, when the employer of an injured harbor worker is also the owner of the vessel and is sued by the harbor worker for negligence under section 905(b) for vessel negligence, the court's task is to analyze the allegedly

negligent conduct to determine whether that conduct was performed in the course of the operation of the owner's vessel as a vessel or whether the conduct was performed in furtherance of the employer's harbor-working operations.

4. *The application of the test to S&B's negligence.*

The application of this test to the present facts leads to the conclusion that S&B was negligent in its capacity as employer, not in its capacity as vessel. Neither the materials barge, nor the crane barge, nor anybody present at the bridge repair site was engaged in vessel duties at the time of the accident.

The task of the materials barge, as a vessel, was to transport building materials from Newark to the work site and to transport debris from the work site to Newark. On the other hand, the task assigned to the negligent Holzheuer and the harbor-working gang of which Gravatt was a part was to make repairs to the 145th Street Bridge, which included the unloading of construction materials brought by the barges and the reloading of the barges with debris. The performance of the construction work was separate and apart from the vessel's work. Gravatt's injury occurred by reason of Holzheuer's negligent conduct within the scope of Holzheuer's employment as a supervisory harbor worker overseeing materials handling in making repairs to the bridge — not in the performance of vessel-related duties. Holzheuer was negligent as agent of S&B in its capacity as contractor performing bridge repairs not in its capacity as vessel owner. Had the bridge repairs been performed by a contractor independent of the vessel, Gravatt, the injured employee,

and Holzheuer, the negligent employee, would both have been employees of the construction contractor, not of the barge used to transport materials to the construction site. In such circumstances it would have been clear that Gravatt's recovery was limited by section 905(a) to his compensation remedy against his employer. He would have had no basis for asserting negligence on the part of the barge owner, who would have delivered the barge loaded with materials to the construction site and been waiting to tow it back to Newark once it was loaded with debris. The fact that Gravatt's injury, resulting from the negligence of his supervisor Holzheuer, took place on a barge owned by their employer, does not justify imposing negligence liability on S&B as owner of the barge, as a third party. Because S&B's negligence was attributable to its capacity as employer rather than its capacity as vessel, its exclusive liability to its injured employee is for the statutory compensation payments under section 904. *See* 33 U.S.C. § 905(a). There was no negligence of anyone acting in a vessel capacity to justify a tort action against the vessel as third party under section 905(b).

As for the crane barge, for a long time it had been tied up at the bridge, dedicated to the harbor-working project of bridge repair. The crane barge was deployed directly in the construction activity — to drive new piles, to extract old piles and to excavate the river bed; it was also used to handle materials in support of that construction activity. All the personnel working on the crane barge were engaged in bridge repair; none was engaged in seafaring work. At the time of the accident, the specific task of the crane barge, whose negligent performance led to Gravatt's injury, was the stevedoring of the materials barge. Stevedoring work is

treated by section 905(b) as not a part of vessel duties. Employees injured while employed by a vessel to provide stevedoring services are expressly barred from bringing a suit for negligence against the vessel under section 905(b), when their injury was caused by the negligence of other persons engaged in providing stevedoring activities. *See* 33 U.S.C. § 905(b).

It may be viewed as an unhappy result to limit a worker seriously injured by the negligence of an agent of his employer to his statutory compensation payments. But that is the intent of workers' compensation laws and it is the result intended by Congress under the LHWCA. The employer's immunity from liability in tort for its negligence is the rule established by section 905(a), while an employee's ability to recover from the vessel under section 905(b) is the exception. *See Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 687 (2d Cir. 1978) (Friendly, *J.*, dissenting) ("Courts must be exceedingly careful in defining the contours of the [covered employee's] action for negligence against the ship . . . lest too expansive notions of the ship's duty vitiate Congress' intent to do away with absolute liability for vessels . . . and make greatly improved compensation benefits the primary remedy for longshoremen and harbor workers."); *Morehead*, 97 F.3d at 613; *Levene v. Pintail Enters.*, 943 F.2d 528, 531 (5th Cir. 1991) ("The availability of a tort remedy for vessel negligence is a limited exception to the . . . LHWCA, which . . . generally replaces negligence causes of action against employers with a system of predetermined, standardized benefits.") (footnote omitted). Congress adopted this position in part because it believed that the best way to protect harbor workers from injury was to place

no-fault responsibility for compensation on their employers. To place tort liability on the vessel merely because it is owned by the same entity as employed the covered workers would be contrary to the scheme Congress developed.

5. *The district court's reasoning.*

The district court imposed liability on S&B on the basis of separate, alternative lines of reasoning. It read *Fanetti v. Hellenic Lines, Ltd.*, 678 F.2d 424, to mean that in a dual-capacity case "the owner-employer is liable to the worker for injuries caused by the owner-employer's negligence . . . [regardless] whether the acts of negligence are attributable to the owner-employer in its capacity as owner or as employer." *Gravatt*, 53 F. Supp. 2d at 424. Alternatively, the district court ruled that "[e]ven under *Morehead*, S&B as *vessel owner*" breached its *Scindia* duties, *Gravatt*, 53 F. Supp. 2d at 421 (emphasis added); and relying on a passage from *Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789 (2d Cir. 1979), it concluded that "Gravatt is entitled to recover against S&B because the injuries were caused by S&B in its *capacity as vessel owner*." *Gravatt*, 53 F. Supp. 2d at 423 (emphasis added). We believe the court misinterpreted the authorities on which it relied.

The district court recognized that *Morehead*'s analysis requires the court to distinguish a dual-capacity defendant's conduct in its employer capacity from its conduct in its vessel capacity, and that in undertaking this analysis the " 'court may have to divide the employer-shipowner into a hypothetical independent employer and independent vessel owner, each separately holding the duties allocated under

principles suggested in *Scindia*.' " *Gravatt*, 53 F. Supp. 2d at 421 (quoting *Morehead*, 97 F.3d at 613).[16] Applying this mode of analysis, the district concluded that:

> S&B as vessel owner had active control over the vessel and its cargo of debris and new material, and knew or should have known[17] about the hazards created when commingling debris and new material and the potential for injury-causing accidents to occur, making it liable under *Scindia*

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16. The district court went on to quote, with added emphasis, *Morehead*'s observation that " '*[o]n occasion, however, the duties and work arrangements pertaining to a suing harbor worker may be so foreign to those in Scindia's stevedoring context that Scindia's analysis will become no more than a point of departure*.' " *Gravatt*, 53 F. Supp. 2d at 421 (quoting *Morehead*, 97 F.3d at 613 (emphasis added in *Gravatt*)). We think the district court misread the significance of *Morehead*'s caution that *Scindia* will sometimes provide only a starting point for defining the scope of a vessel's duties of care. That caution does not abrogate the need to distinguish in dual-capacity cases between defendant's negligence *qua* vessel and its negligence *qua* employer. As we recognized as early as *Smith*, that distinction is always the "key issue" in dual-capacity cases. *Smith*, 604 F.2d at 795. *Morehead* cautions only that in defining the vessel's duties of care *qua* vessel in a non-stevedoring case, *Scindia*'s instruction may sometimes not be that pertinent. It provides no support for the conclusion that "[t]here is no need to determine whether the acts of negligence are attributable to the owner-employer in its capacity as owner or as employer." *Gravatt*, 53 F. Supp. 2d at 424.

17. Even under *Scindia*'s duty to intervene, "should-have-known" constructive knowledge is insufficient to meet the actual knowledge requirement. *See* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 447 & n.74 (2d ed. 1994).

> standards. S&B did not exercise ordinary care in keeping its debris/material barge, crane barge, and vessel equipment in a condition that would permit its workers, who were not expert and experienced stevedores, to carry on cargo operations safely. . . . S&B failed to fulfill its *Scindia* duty to intervene and correct the hazardous condition created by commingling the debris and good materials on its barges and the use of timber tongs. *Morehead* also holds that the *Scindia* duty arising from active control over a hazardous condition is triggered when the dangerous condition is on the vessel itself.

Id. at 421-22 (citations omitted).

In our view the district court's observations justify the conclusion that S&B was negligent, but not that it was negligent in its capacity as vessel owner. A-K, the vessel owner in *Morehead*, also had been negligent in circumstances where its agents exercised active control of the barge and had actual knowledge of the hazard. Nonetheless it was not held liable under section 905(b) because its negligence was in its capacity as the employer of construction workers, rather than in its capacity as vessel owner. *See Morehead*, 97 F.3d at 614, 616. Although the dangerous condition arose on A-K's vessel through the negligence of A-K's employee, it was caused by the negligence of a worker acting within the scope of his employment as a harbor worker who had been employed by the dual-capacity defendant in its capacity as construction contractor. In its role as vessel owner, A-K had turned the vessel over to the care of its harbor workers assigned to the construction project.

The same is true of this case. Gravatt and his foreman Holzheuer were hired by S&B in its capacity as construction contractor to make repairs to the bridge's fender system. S&B also chartered barges. S&B's crane barge had been turned over to S&B's harbor construction workers: it was used either directly in construction activities — extracting old piles, driving new piles and excavating the river bed — or in the materials handling operations. S&B's materials barge, having transported construction materials from Newark to the bridge site, was turned over to S&B's construction employees to have the new materials offloaded and the debris materials loaded on. In performing this materials handling operation, these employees acted negligently, but this negligence arose from operational decisions made by S&B in its capacity as construction contractor not in its capacity as vessel owner. While S&B had "active control" over the barge, and "actual knowledge" of the negligent conduct, those facts are not sufficient to render it liable, unless that active control or actual knowledge was in its role as vessel owner.[18]

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18. As we have noted, in a non-stevedoring case involving harbor work, *Scindia*'s delimitation of the scope of the duties of care owed by the vessel may only provide a starting point for the analysis of whether the vessel was negligent. *See supra* note 15. Even applying *Scindia*'s tests mechanically, we conclude no agent of S&B in its vessel capacity "actively involve[d]" itself in the material handling operations. *Scindia*, 451 U.S. at 167. And there were no areas of the barge that remained outside the control of the construction workers and therefore under "the active control of the vessel." *Id.* The district court's assertion that "*Morehead* . . . holds that the *Scindia* duty arising from active control over a hazardous condition is triggered when the dangerous condition is on the vessel itself," *Gravatt*, 53 F. Supp. 2d at 422, misreads *Morehead*'s holding

(Cont'd)

Appendix A

In further support of its conclusion that Gravatt's injuries "were caused by S&B in its capacity as vessel owner," *Gravatt*, 53 F. Supp. 2d at 423, the court also cited our opinion in *Smith*, 604 F.2d 789, and quoted language from that opinion which stressed that the " 'acts and omissions found to constitute actionable negligence all took place prior to the actual dive' " in which the covered worker drowned. *Gravatt*, 53 F. Supp. 2d at 424 (quoting *Smith*, 604 F.2d at 796). The district court reasoned that "S&B's negligence [also] preexisted the date of the injury," *id.*, because the evidence showed that S&B's negligent work practices — the mixing of debris and new material on the materials barges and the use of timber tongs as hoisting equipment — "were consistent practices adopted prior to the accident." *Id.*

We do not agree with this understanding of *Smith*. In *Smith*, decided before *Scindia*, *Fanetti* and the 1984 Amendments, we recognized that in dual-capacity cases "in order to determine whether a shipowner-employer may be held liable for damages, a court must decide if the negligence that caused the accident was owner occasioned." *Id.* at 795 (internal quotation marks omitted). Therefore, "the key issue [was] whether the shipowner's employees who were at fault committed the negligent acts in their capacity as agents of the vessel on the one hand or as employees performing

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(Cont'd)
and reasoning. No liability was found in *Morehead*, notwithstanding that the hazardous condition (the open hatch) was "on the vessel itself," because the hazard arose while the barge was not in the active control of the dual-capacity employer acting in its capacity as vessel owner. That the hazard was "on the vessel" is insufficient ground to impose liability.

longshoring, shipbuilding, or repair services on the other." *Id.* Our approach in *Smith*, therefore, is consistent with the bifurcated analysis of the conduct of a dual-capacity defendant adopted by the First Circuit in *Morehead* and the Fifth Circuit in *Castorina*. The key question is, in what capacity was the defendant negligent?

In *Smith*, plaintiff's deceased husband was employed by defendant as a diver to inspect underwater damage to a dredge, owned by the defendant. He worked off a tug which was also owned by the defendant. When he jumped into the water, the heavy equipment he wore overturned him, putting him in distress. The efforts of the tug personnel to right him, buoy him and haul him from the water were unsuccessful and he drowned. The jury at trial determined that the defendant was negligent by reason of the tug's failure to have (i) an emergency plan, (ii) a rescue line, life ring or life raft, and (iii) a ladder to facilitate reboarding. The district court, however, entered judgment for the defendant because it held that the negligence was that of tug employees who, like the decedent, were involved in the provision of repair services. *See Smith*, 604 F.2d at 792-93.

We reversed, directing the entry of judgment for the plaintiff. *See id.* at 798. Plaintiff argued to us that defendant's "negligence as shipowner rather than the negligence of its employees acting as repairmen caused the drowning." *Id.* at 793. We agreed. We observed that in ruling for the defendant, the district court did not undertake

> sufficient scrutiny of the particular negligent acts that were found to have been committed. The acts

> and omissions found to constitute actionable negligence all took place prior to the actual dive and were akin to a failure to provide a safe place to work. The absence of a rescue plan, the improper placement of emergency apparatus, and the failure to provide a ladder or platform were all defects in the general operation of the tug, and it is merely fortuitous that they came to light during a dive that was part of a repair program.

Id. at 796 (footnotes omitted).

The negligence was found to be in the vessel capacity because it consisted of the failure to equip the tug properly for emergencies. That the negligent acts occurred prior to the accident, the fact upon which the district court in our case focused, was not the crucial point in *Smith*; it was merely a facet of the overall conclusion that the negligence was in the role of vessel and not in the role of employer performing the task for which the plaintiff was hired.

As we have seen, that bifurcated analysis leads to an opposite conclusion in this case. It may be that the patterns of negligent conduct — the loading of debris so as to obstruct access to new materials and the use of tongs — had been established prior to the accident that resulted in the injury. But those negligent work practices were undertaken as part of the materials handling process in performance of the bridge repairs for which plaintiff was hired. They were not, as was the case in *Smith*, a part of the "operation of the [vessel]." Accordingly, the record of consistently negligent work practices establishes only that S&B was a consistently negligent

employer that routinely failed to provide a safe place to work. And Gravatt's remedy against S&B in its capacity as his employer is limited to the statutory compensation payments under section 904. *See* 33 U.S.C. § 905(a). The record proves only negligence in S&B's role as the employer of Gravatt and his crew, not in S&B's role as vessel owner.[19]

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19. In this respect, there is a somewhat confusing observation in the *Smith* opinion. After explaining that the negligent acts justifying the vessel's liability were defects in the general operation of the tug and not a part of the repair program, the court observed that "Eastern [the employer and owner of both the tug and the damaged dredge] might have escaped liability if it had surrendered control over the operation to a subcontractor that could supply and supervise its own divers." *Smith*, 604 F.2d at 796. That observation might seem to contemplate that a different result would obtain depending whether an independent contractor were employed. But if Eastern had employed an independent contractor for the dive, nonetheless using its own tug to bring the diver to the repair site, and the accident had happened in the same fashion, Eastern would have remained liable for its negligence as third party under the first sentence of 905(b) because the negligence giving rise to the liability was premised not on how the diving operation was performed but rather on Eastern's failure as tug owner to equip its tug with a proper rescue plan and rescue equipment. What the court must have contemplated in the sentence was that Eastern might not only have hired an independent contractor to provide the diver but also relied on that independent contractor to supply the tug that brought the diver to the site. In those circumstances, it is true Eastern would have escaped liability — because there would have been no negligence whatsoever on Eastern's part. Nonetheless the result would have been similar in that the tug owner would have incurred liability for furnishing a negligently equipped tug. From the point of view of the vessel and the plaintiff, the result would have been the same. The only change would have been in the identity of the owner of the vessel held liable to the plaintiff.

Appendix A

As noted, the district court's second basis for imposing liability was its reading of *Fanetti*, 678 F.2d 424. In response to S&B's argument that it was negligent in its role as employer, not in its role as vessel owner, the court explained,

> [i]n *Fanetti*, the Second Circuit answered the question of whether a shipowner choosing to act as its own stevedore is entitled to insulation from liability, partial or total, which hiring an independent stevedore might otherwise afford. The Second Circuit answered that question in the negative, affirmed a verdict in favor of the plaintiff, and held that a shipowner choosing to act as its own stevedore is not entitled to insulation from liability under the LHWCA. S&B as vessel owner in this case, acted as its own [contractor], and *any negligence on its part is actionable vessel owner negligence under* § 905(b).

Gravatt, 53 F. Supp. 2d at 420-21 (emphasis added). The district court concluded that:

> Under *Fanetti*, . . . when an owner-employer does not use an independent stevedoring contractor to load, unload, or restow cargo, the owner-employer is liable to the worker for injuries caused by the owner-employer's negligence. *There is no need to determine whether the acts of negligence are attributable to the owner-employer in its capacity as owner or as employer.*

Id. at 424 (emphasis added).

This conclusion is contrary to the Supreme Court's observation in *Jones & Laughlin* that "a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity." *Jones & Laughlin*, 462 U.S. at 531 n.6. It conflicts with Congress's express intent, and the logic and language of the LHWCA, that the worker's entitlement to a tort remedy should not depend on whether he was employed directly by the vessel or by an independent contractor. *See id.* at 532; *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266 (1979). Finally, it conflicts with our own previous case law which recognizes this intent. *See Napoli*, 536 F.2d at 507; *Smith*, 604 F.2d at 795; *Albergo v. Hellenic Lines, Inc.*, 658 F.2d 66, 68-69 (2d Cir. 1981).

We believe the district court read the pertinent passage from *Fanetti* out of context. Pasquale Fanetti worked as a longshoreman loading containers on board the Hellenic Splendor. Hellenic Lines Ltd. ("Hellenic"), the owner of the vessel, made a practice of hiring its own longshoremen, rather than engaging a stevedoring contractor. Thus Hellenic stood in a dual capacity with respect to Fanetti, acting both as his employer and as the vessel on which he worked. Fanetti was injured when he slipped and fell by reason of greased and oily lashing gear, which the vessel's crew negligently had left obstructing a walkway. The vessel's crew was responsible for lashing down the cargo containers after they had been loaded by the longshoremen. The crew had left the lashing gear on the deck in preparation for that task. Both Fanetti and his hatch boss on the stevedoring crew had complained to the vessel's crew about the obstruction to the walkway, but to no avail. *See id.* at 426.

Not surprisingly, the jury found that Fanetti was injured as the result of negligence on the part of the vessel, and the district court entered judgment against Hellenic. It was clear that "[c]rew negligence created the hazard." *Id.* at 427. The negligence had been in the dual-capacity employer's role as vessel owner. On appeal, Hellenic did not dispute that proposition. *See id.* at 426 ("We do not understand Hellenic to dispute on the appeal that the vessel's crew, in the performance of work unrelated to the longshoremen's loading of cargo, created a condition on deck dangerous to the longshoremen who had to work there."). Rather Hellenic contended that notwithstanding that the dangerous condition arose from the negligent conduct of its vessel's crew, the jury should have been instructed that the "stevedore bears the primary responsibility to correct dangerous conditions" and that liability under section 905(b) lies against the vessel only if the vessel could reasonably anticipate that the stevedore would not correct the hazard. *Id.* at 427. Hellenic argued that the jury should have been instructed on the distinction between the safety responsibilities of the shipowner and the stevedore; in particular Hellenic complained that the jury was not instructed that the stevedore was responsible for insuring compliance with health and safety regulations relating to longshoring. *Id.* at 427.

We disagreed and affirmed the district court. We noted that even if the jury had been instructed in the manner that Hellenic requested, "exoneration of Hellenic on the evidence in this case [was] unlikely." *Id.* However, we declined to affirm on the basis that any error in the charge was harmless. We noted that in *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980), this court had imposed a

10% share of responsibility on a stevedore, which had failed to discharge a non-delegable duty imposed by an OSHA regulation requiring it to keep its work area free of tripping hazards, notwithstanding " '[t]he fact that the hazard was primarily the ship's responsibility.' " *Fanetti*, 678 F.2d at 427-28 (quoting *Doca*, 634 F.2d at 33). Because we were "not prepared to say that no reasonable jury could find that the obstruction was at a place where an independent [stevedore] contractor (if one existed) would have been expected to remove it," we therefore reached the question "whether a shipowner choosing to act as its own stevedore is entitled to that insulation from liability, partial or total, which hiring an independent contractor might have afforded." *Id.* at 428

We answered the question "in the negative," citing the language of Judge Van Graafeiland in *Napoli*, 536 F.2d at 508, and of Judge Friendly in a dissenting opinion in *Canizzo v. Farrell Lines*, 579 F.2d 682, 689 (2d Cir. 1978), to the effect that to relieve a shipowner of liability for a dangerous condition it had created because that hazard was known to the stevedore was clearly inappropriate where the shipowner acts as its own stevedore. *See Fanetti*, 678 F.2d at 428.

While it is true we concluded in *Fanetti* that "a shipowner choosing to act as its own stevedore is [not] entitled to that insulation from liability, partial or total, which hiring an independent contractor might have afforded," *id.* at 428, the district court read far too much into the statement.[20] *See Gravatt*,

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20. We recognize that the district court was not alone in reading *Fanetti* to establish that a dual-capacity defendant will be liable in (Cont'd)

See Gravatt, 53 F. Supp. 2d at 424 ("There is no need to determine whether the acts of negligence are . . . in its capacity as owner or as employer."). *Fanetti* did not mean that when a vessel hires its own personnel to perform harbor work, rather than bringing in an independent contractor, it is liable to the workers in tort for all injuries caused by the negligence of its employees, regardless whether the negligent conduct occurred while the defendant was operating in the capacity of vessel or of employer.

It was undisputed that Hellenic's negligent acts in *Fanetti* were committed in its role as vessel by the vessel's

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negligence under section 905(b) regardless whether its negligent conduct was in its capacity as the employer of harbor workers covered under the LHWCA or in its capacity as vessel. *See, e.g., Morehead*, 97 F.3d at 611 (hypothesizing that we would no longer endorse *Fanetti* in the light of the Supreme Court's decision in *Jones & Laughlin*); *Sutherland v. City of New York*, 699 N.Y.S.2d 426, 431 (2d Dep't 1999) (adopting the First and Fifth Circuits' analysis as "consistent with Congressional intent and the limitations on employer liability set forth in the LHWCA" and suggesting we would no longer endorse *Fanetti*); Frazor T. Edmondson, *Toward a Vessel Owner's Interpretation of Dual Capacity: Why Fanetti Should be Deemed Implicitly Overruled*, 18 Del. J. Corp. L. 477 (1993). We agree that such a reading of *Fanetti* endorses a result that conflicts with the intentions expressed in the House Committee Report, with the Supreme Court's admonition that "all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore," *Edmonds*, 443 U.S. at 266; *accord Jones & Laughlin*, 462 U.S. at 532, and with our own case precedents, *see Napoli*, 536 F.2d at 507; *Smith*, 604 F.2d at 795; *Albergo*, 658 F.2d at 68-69. We respectfully believe that the district court and the cited commentators have read more into *Fanetti* than we intended.

permanent crew. Had the negligent obstruction of the walkway resulted from the carelessness of the stevedoring gang, which Hellenic had hired directly rather than retaining a stevedoring contractor, *Fanetti* does not suggest that the vessel would have been liable in tort under section 905(b). Such a result would make the vessel's liability turn on whether the shipowner hired a stevedoring contractor or directly hired the longshoring crew — the very result Congress sought to avoid. *See* H.R. Rep. 92-1441, 1972 U.S.C.C.A.N. at 4705; *see also Jones & Laughlin*, 462 U.S. at 532 (" '[A]ll longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore . . . .' ") (quoting *Edmonds*, 443 U.S. at 266); *Napoli*, 536 F.2d at 507 ("The expressed intent of Congress was that the same principles should apply in determining the liability of a vessel which employs its own longshoremen as apply when they are the servants of an independent contractor.").

What we meant in *Fanetti* was that a shipowner that has incurred liability in its vessel capacity by the negligent acts of its vessel's crew cannot escape any part of that liability by pointing to the failure of its own stevedoring employees to correct the hazard. A dual-capacity defendant, negligent *in its vessel capacity*, cannot escape liability under section 905(b) by asserting that it should have removed the hazard in its stevedoring capacity.[21] In this case, however, the

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21. We note a further reason why the *Fanetti* discussion cannot justify the result reached by the district court. When *Fanetti* entertained the question whether a shipowner acting as its own stevedore is entitled to "that insulation from liability, . . . which

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(Cont'd)
hiring an independent contractor *might* have afforded," it was considering a speculative possibility. *Fanetti*, 678 F.2d at 428 (emphasis added). But the supposition entertained by *Fanetti* that a shipowner that had negligently created a dangerous condition in its vessel capacity could diminish its liability simply by hiring an independent stevedore is contrary to fact. As the Supreme Court made clear in *Edmonds*, in the classic triangular situation in which the covered worker is employed by an independent contractor, if the worker's injury is caused by negligence on the part of both the vessel and the worker's independent employer, the employer will be shielded from liability in tort by the exclusivity of the compensation remedy and the vessel will be liable for the full extent of the harm. *See Edmonds*, 443 U.S. at 264 ("[T]he longshoreman may recover the total amount of his damages from the vessel if the latter's negligence is a contributing cause of his injury, even if the [employer] stevedore, whose limited liability [compensation] is fixed by statute, is partly to blame.").

The *Fanetti* court contemplated that the vessel's employment of an independent contractor might diminish its liability because, in *Doca*, a ten percent allocation of liability had been placed on the independent stevedore by reason of its failure to clear up the hazard negligently created by the vessel. But *Doca* did not involve the relationship between ship and independent stevedore *as employer*. *See Doca*, 634 F.2d at 32. In *Doca*, the injured harbor worker was employed by a subcontractor which in turn had been retained by the independent stevedore. In their relation to the injured worker, both the stevedore and the vessel were third parties. Neither was shielded from liability by the exclusivity of the compensation remedy, and neither was barred from seeking contribution against the other. The judgment was presumably joint and several. The injured worker was therefore able to recover 100% of his judgment against either third-party tortfeasor.

Although it is true that the ship was able to recoup a part of the judgment by virtue of the independent stevedore's comparative fault

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threshold question is whether S&B was negligent in its vessel capacity.

If the dual-capacity defendant acts negligently as an employer, its exclusive liability under LHWCA is for compensation, just as if it were an independent contractor. If its negligence is in its vessel capacity, it is liable to its employee in tort under section 905(b), to the same extent as a third-party vessel would be liable to the injured employee of an independent employer injured as the result of the third-party vessel's negligence, and the vessel does not escape liability on the theory that its employees acting in furtherance of its employer capacity ought to have prevented the injury.

Because S&B's negligence which caused Gravatt's injury was committed only in its role as his employer in the bridge repairs, and not in its role as owner of the barge on which he was injured, S&B's liability is limited by the LHWCA to compensation. The judgment against it must be vacated. It is, therefore, not necessary to reach the other arguments raised.

CONCLUSION

The judgment against S&B is reversed.

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and that this would not have been possible if the ship had acted as its own stevedore, that is simply because the division of roles in *Doca* resulted in a larger number of third-party tortfeasors. It did not affect the amount the plaintiff was entitled to recover. If the plaintiff in *Doca* had been the employee of the independent stevedore, the full liability would have fallen on the ship, without right of contribution. *See* 33 U.S.C. § 905(b) (overruling *Ryan* indemnity).

APPENDIX B — REVISED OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 24, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

97 Civ. 0354 (RWS)

STEVEN GRAVATT and DELORES GRAVATT,

Plaintiffs,

– against –

THE CITY OF NEW YORK, SIMPSON & BROWN, INC., N. MASSAND, P.E., L.S., P.C., a/k/a NANIK MASSAND, P.E., BARGE "ABC" and BARGE DEF, their engines, boilers, tackle, etc., in rem,

Defendants.

REVISED OPINION

* * *

Sweet, D.J.

Plaintiffs Steven Gravatt ("Gravatt"), a journeyman dock worker and his wife Delores Gravatt ("Mrs. Gravatt") (collectively the "Gravatts") have sought damages from defendants The City of New York (the "City"), Simpson & Brown, Inc. ("S&B"), the employer of Gravatt, and N. Massand, P.C. ("Massand"), an engineering firm, arising

out of an injury Gravatt received while working on the City's 145th Street Bridge (collectively, the "Defendants"). The City has cross-claimed against S&B and Massand and Massand has cross-claimed against S&B.

Upon the findings of fact and the conclusions of law set forth below, judgment will be entered in favor of Gravatt and Mrs. Gravatt against the City, Massand and S&B. Judgment will be entered in favor of the City on its cross-claim for indemnity against S&B and Massand. Massand's cross-claim against S&B will be dismissed.

The Issue

A relatively simple accident has given rise to a complicated litigation in which five causes of action are alleged against three corporate defendants with a web of cross-claims asserted among the defendants. Because of the uncertainties of the law and the conflicting views of insurance coverage, it has not been possible to accomplish a simple and just resolution by compromise and common sense. The complicated findings and conclusions set forth below result from the inability of insurers to agree on questions of coverage. It is that expensive offstage controversy which has driven this litigation, conducted by skilled and able lawyers for each of the parties.

Once again, the Court has been cast into "The Devil's Own Mess."[1] Indeed, to obtain a just result for the Gravatts

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1. *See* D. Currie, Federalism and the Admiralty: "The Devil's own Mess," 1960 S. Ct. Rev. 158 (1960).

it has become necessary to deal with some of the most exasperating issues in tort law, complicated by difficult legislation and precedent as will be apparent from what follows.

Prior Proceedings

This action was commenced on January 16, 1997 by a complaint which set forth five causes of action: (1) liability of the City and Massand under the Labor Law of New York and federal law; (2) common law negligence against S&B and Massand; (3) a seaman's maritime claim based upon an unseaworthy vessel against S&B; (4) a claim against S&B as owner of the barges for negligence, defective maintenance and improper working conditions; and (5) loss of consortium by Mrs. Gravatt. Answers were filed and pretrial proceedings and discovery were had.

An opinion of April 6, 1998 (the "April 6 Opinion") resolved summary judgment motions holding that the Gravatts were entitled to judgment against the City and Massand under New York Labor Law §§ 200, 240(1), and 241(6) with the issue of contributory negligence under §§ 200 and 241(6) reserved for trial, and that the Gravatts stated claims under Section 905(b) of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C.A. §§ 901-950 ("LHWCA"), and the Jones Act, 46 U.S.C.A. § 688, that the City is entitled to indemnity from Massand and S&B, that Massand is not entitled to indemnity from S&B with Massand's contribution claim against S&B reserved for trial. *See Gravatt v. The City of New York*, 1998 WL 171491 (S.D.N.Y. April 6, 1998).

Thereafter, all of the defendants moved for reargument and two of them (the City and S&B) also sought an order certifying the Opinion for an interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b). The opinion of June 24, 1998 denied the motion for certification, denied Massand's motion for indemnity against S&B, dismissed S&B's claims for indemnity and contribution against Massand, denied the City's motion to reconsider the application of the Labor Law to the action, granted S&B's motion to dismiss the plaintiffs' Jones Act claim, and amended the identity of the insurance company providing certain coverage to Massand. *See* 1998 WL 341941 (S.D.N.Y. June 24, 1998).

Massand then made a second motion to reargue the Court's decision regarding Massand's contribution claims against S&B. The opinion of August 19, 1998 dismissed Massand's second motion to reargue as moot, noting that Massand's indemnity claim against S&B had been dismissed, not its contribution claim. *See* 17 F.Supp.2d 247 (S.D.N.Y. 1998).

Prior to trial, the parties consented to a bench trial which commenced on November 30, 1998, and continued through December 4, 1998. The Gravatts called seventeen witnesses. S&B called two expert witnesses and the City called no witnesses. Final argument and submissions were completed on February 3, 1999.

On March 3, 1999, an opinion was filed containing findings of fact and conclusions of law based upon the bench trial (the "Opinion"). The Gravatts then moved under Rule 52(b) to amend the Opinion, which motion was granted by a

companion opinion filed this date, setting forth the basis for the revisions contained in this revised opinion.

Findings of Fact

The Parties

Gravatt is a New Jersey resident and a journeyman dock builder and harbor worker who has worked for S&B since 1993. Gravatt has been married to Mrs. Gravatt for over seventeen years. Gravatt suffered severe, permanently disabling injuries while working at the 145th Street Bridge in Manhattan on January 31, 1996. He was 37 years old at the time of the accident.

The City of New York is a municipal corporation which maintains the New York City Department of Transportation in which there is a division formerly known as the Bureau of Bridges, now known as the Division of Bridges.

S&B is a New Jersey construction company.

Massand is a New York engineering firm.

The Project

In late 1992, the Bridge Component Rehabilitation Section began a project in Manhattan to replace the fender systems on the Third Avenue and 145th Street Bridges which span the Harlem River (the "Project").

The fender system is a structure that looks like a pier which is attached to and surrounds the stone and mortar

center stanchion of the bridge and consists of heavy pilings and timbers, and smaller, horizontal and diagonal pieces of lumber known as walers and braces for the purpose of protecting the bridge from collisions with ships traveling in the river. Its construction required the demolition and removal of the old, existing fender and some excavation of the river bottom.

The two bridges which were the subject of the Project are owned by the City and the Project was funded entirely by the City without state or federal financial aid. It was completed in 1996.

The City hired two contractors to perform the Project: a consulting engineer, Massand, to provide engineering, design, and other services; and S&B to do the construction. The City entered into a written contract with each defendant contractor. The contracts were awarded by competitive bidding, and Massand and S&B were the low bidders on their respective contracts.

The Contracts

Compliance with state and federal safety statutes was a standard practice of City construction projects. The contracts with Massand and S&B contained numerous safety provisions.

The contract between the City and S&B was entered into on May 7, 1992. It contained the following provisions:

> *Labor Law Requirements*. The successful bidder [Simpson & Brown] will be required to comply

strictly with all Federal, State and local labor laws and regulations, including but not limited to providing on-the-job training opportunities and payment of prevailing wages.

Article 5. *Compliance with Laws*. The Contractor must comply with all local, state and federal laws, rules and regulations applicable to this contact and to the work to be done hereunder, including, but not limited to, the Federal Occupational Safety and Health Act of 1970 ["OSHA"] the Construction Safety Act of 1969, as amended, and the following. . . .

Article 30. *The Resident Engineer*. The Resident Engineer shall be the representative of the Engineer at the site, and, subject to review by the Engineer, shall have the power, in the first instance, to inspect, supervise and control the performance of the work. . . .

Article 36. *Labor Law Requirements*. The Contractor must strictly comply with all applicable provisions of the New York State Labor Law, as it may be amended and supplemented thereto, and the provisions of Section 343-9.0 of the New York City Administrative Code, as amended. . . .

Article 36(b). That no part of the work, labor or services shall be performed or rendered by the Contractor in any plants, factories, buildings or

surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary and factory laws of the State in which the work is to be performed shall be prima facie evidence of compliance with this subsection.

That for any breach or violation of any of the paragraphs on working conditions and minimum wages above, the party responsible therefor shall be liable to The City for liquidated damages . . . in addition, the Commissioner shall have the right to cancel the contract for any violation of this section and enter into other public letting, charging any additional cost to the original Contractor. . . .

Any breach or violation of any of the foregoing shall be deemed a breach or violation of a material provision of this contract, and ground for cancellation thereof by the City.

Paragraph 1.06.22. *Contractor's Plant.* The Engineer shall have the right to reject or condemn any plant, apparatus, staging or other appliance which, in his opinion, is unsafe, improper or inadequate. Whether or not the Engineer exercises this right, the Contractor shall not be relieved from his sole responsibility for the safe, proper and lawful construction, maintenance and use of such plan, apparatus, staging or other appliance or for the adequacy of such plant. . . .

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Paragraph 1.06.23. *Rules, Laws, and Requirements.* (A) The Contractor shall, at his own cost, obtain all necessary permits, give all necessary notices, pay all legal fees and comply with all Federal, State and City Building and Sanitary Laws, ordinances and regulations applicable to this contract and to the work to be done hereunder. . . .

Superintendence. Prior to commencement of the contract, the Contractor shall designate, in writing, Superintendents responsible for the contract work. A Superintendent must be on each job site continuously and will not be changeable [chargeable] to this contract and shall be considered as overhead. . . .

The contract between the City and Massand was entered into on August 26, 1992, and contained the following safety provisions.

(a) Paragraph 5. The Engineer [Massand] shall ascertain the standard practices of the City prior to the execution of any of the work required by this Agreement. All work under this agreement shall be performed in accordance with these standard practices and the provisions of the contract documents. The contract documents shall be deemed to include this agreement, with accompanying schedule or schedules, if any, the construction contracts, and any supplements thereto, the standard Bureau of Highway Operations

specifications, the plans of the project, any addenda to the plans, and project, and all the provisions required by law to be inserted in the Agreement and made a part hereof.

(b) Paragraph 6. The Engineer shall, upon written notice to commence work, take full charge of the Engineering Inspection of the project. The Engineer shall thereafter initiate all necessary orders to the Contractor(s), personally give field orders when necessary . . . .

(c) Section III. *Resident Engineering Inspection Services to be Performed.* (A) The Engineer shall provide continuous resident engineering inspection services, testing of materials services, design services, and shop drawing review services with a staff commensurate with the level of construction activity until completion and final acceptance of the Construction Contract work. . . .

(d) Section I. *General Requirements.* (B) The Engineer specifically agrees that: (a) his subcontractors, agents or employees shall possess the experience, knowledge, and character necessary to qualify them individually for the particular duties they perform; (b) he will comply with the provisions of the Labor Law and all State Laws and Federal and local statutes,

ordinances and regulations that are applicable to the performance of the Agreement. . . .

(e) Section II. *Resident Engineering Inspection — General.* (A) The Engineer shall be the representative of the Department at the sites and, subject to review by the Commissioner or his duly authorized representative, shall have the power, in the first instance, to inspect the performance of the work. . . .

(f) Section II. *Resident Engineering Inspection — General.* (B) The Engineer agrees that he will endeavor to safeguard the City against deficits and deficiencies in the work and that he will use reasonable care and reasonable powers of observation and detection in determining that the work conforms to the Construction Contract documents.

(g) Section II. *Resident Engineering Inspection — General.* (C) It is the responsibility of the Construction Contractor(s), and not the responsibility of the Engineer, to determine the "Means and Methods of Construction", as defined in Article 2, Paragraph 17 of the Agreement section of the Standard Specifications of the Bureau of Highway Operations, dated June, 1986, as currently amended. However, if the Engineer reasonably believes that the means and methods of construction proposed by the

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Construction Contractor(s) will constitute or create a hazard to the work, or to the persons or property, or will not produce finished work in accordance with the terms of the Construction Contract, such means and methods must be reported to the Commissioner, or to his duly authorized representative.

(h) Section III. *Resident Engineering Inspection Services to be Performed.* (A) The Engineer shall provide . . . basic resident engineering inspection services for all items of work under the Construction Contract . . . . These services are to include monitoring of the Construction Contractor's activities for conformance with the contract documents, coordination with City Agencies and public and private utilities, and monitoring the condition of the contract site for conformance with the contract documents, so as to provide a safe environment for both workers and the general public . . . .

(i) Section IV. *Fees and Payments.* (G) If the Construction Contractor performs the work in such a manner, or at such a number of simultaneous locations, as to require the Engineer, under the direction of the Commissioner, to provide additional inspectors such that the total inspection manpower, in person-days, shown on Table,

> will be exceeded, then this condition will be considered a change in the scope of this contract and a change order will be issued, subject to the approval of the Director of the Office of Management and Budget, increasing the maximum fee. . . .
>
> (j) Appendix A. 4.8 *Compliance with Law.* Contractor shall render all services under this Agreement in accordance with applicable provisions of federal, state and local laws, rules and regulations as are in effect at the time such services are rendered.

The City and Massand contract provides that Massand's duties "specifically do not include the choice of construction labor, materials, temporary structures, tools, plants and construction equipment, or the method and time of their use." Massand Agreement, Paragraph 2 at 1.

The Massand contract further provides that "it is the responsibility of [S&B], and not the responsibility of the engineer, to determine the 'Means and Methods of Construction', as defined in [the S&B Contract]." Massand Agreement, Section II(C) at SR-3.

Under the contract between the City and S&B, S&B was responsible for the "means and methods of construction," defined in the S&B contract as "the labor, materials in temporary structures, tools, plant and construction equipment, and the manner and time of their use, necessary to accomplish the result intended by this contract". Agreement, Art. 2.18, at 31.

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The contract between the City and S&B also provided that "the means and methods of construction shall be such as [S&B] may choose; subject, however, to the engineer's right to reject means and methods proposed by the contractor which will constitute or create a hazard to the work, or to persons or property . . ." Agreement, Art. 4, at 32, and that "[t]he engineer's approval of [S&B's] means and methods of construction, or his failure to exercise his right to reject such means or methods, shall not relieve [S&B] of his obligation to accomplish the result intended by the contract . . ." Agreement, Art. 4, at 31, and that "[d]uring performance and up to the date of final acceptance, [S&B] must take all reasonable precautions to protect the persons and property of others from damage, loss, injury or death resulting from his or his sub-contractor's operations under this contract, except such property as the owners thereof may themselves be under legal duty to protect." Agreement, Art. 7, at 34. The City and S&B's contract later confirms S&B's safety duties under article 7 of the S&B contract, by providing that "[t]he Contractor shall protect the work, persons and property in accordance with the provisions of article 7 of the Agreement . . ." Agreement, General Provisions, Section 1.06.28 at 110.

The City and S&B contract further provides that the "Engineer shall have the right to reject or condemn any plant, apparatus, staging or other appliance which, in his opinion, is unsafe, improper or inadequate. Whether or not the engineer exercises this right, [S&B] shall not be relieved from his sole responsibility for the safe, proper and lawful construction, maintenance and use of such plant, apparatus, staging or other appliance or for the adequacy of such plant."

Agreement, General Provisions, Section 1.06.22 at 104. The Massand Contract further provides that Massand "shall be the representative of [the City] at the sites and, subject to review by [the City] or [its] duly authorized representative, shall have the power, in the first instance, to inspect the performance of the work, as delineated in article 30 [of the S&B Contract]". Massand Agreement, Section II(A) at SR-3.

S&B was required to follow orders given by the City or Massand. The resident engineer, who was employed by Massand, worked from an office near the Third Avenue Bridge and was in charge of field activities. The inspectors answered to the resident engineer. The resident engineer was a licensed engineer, but the inspectors, like S&B's supervisory personnel, were not licensed engineers and had no training in construction site safety.

The Massand inspectors were required to be at the job site whenever S&B was working. The contract required Massand to provide "continuous" services with a "staff commensurate with the level of construction activity." Massand Agreement, Section I(A) at SR-1.

The Massand contract obligated Massand to "provide a safe environment for both workers and the general public," and the S&B contract, which was incorporated into Massand's, stated that Massand had the "power . . . to inspect, supervise and control the performance of the work." Massand Agreement, Section III(A) at SR-5; Section II(A) at SR-3. The two Massand inspectors who worked at the 145th Street Bridge confirmed that their duties included the

supervision of worker safety at the job site. They prepared written inspection reports daily in the course of their employment at the 145th Street Bridge. Many of the daily inspection reports contained notes of safety instructions and recommendations given by the inspectors to S&B relative to conditions on the site.

The City retained the right under the contracts to compel compliance with safety regulations and its Project Engineer had the authority to, and would, direct that safety problems be cured. On at least one occasion, the City and Massand stopped work at the site and would not allow S&B to resume work until safety violations were cured, as demonstrated in the following entry in Massand's daily work log:

> Contractor was instructed to clean & clear all walk-ways & access to the barge & also to correct the position of the ladder & remove all debris & other construction material so as to give clear & hazard-free access while moving with-in & around the working area. Contractor was given permission to start working after compliance of the above instructions.

In general, the City allowed Massand to have a single inspector at the project at any given time, the exception being when there was considerable construction activity, which was not the case on the day of Gravatt's accident.

The City required both S&B and Massand to comply with the New York State Labor Law, New York Industrial Code, and OSHA, but made no effort to determine whether

these companies knew anything about the state and federal regulations regarding construction site safety. No one assigned to this project by Massand or S&B had any knowledge of, or experience or training in, the safety statutes incorporated in the City's contracts.

Massand, however, represented to the City in its contract that its employees "possessed the experience, knowledge, and character necessary for the particular duties they perform." Massand Agreement, Section I(B) at SR-2.

Massand's contract required Massand to "[monitor] the condition of the contract site . . . so as to provide a safe environment for both workers and the general public." Massand Agreement, Section III(A) at SR-5. Massand has contended that the thirty-two examples that follow this provision of the contract concerned activities that were not involved in the accident at issue and therefore indicate that Massand had no duty to supervise the condition of the barges or the use of timber tongs. However, the examples are introduced by the contract language that "may include, but shall not be limited to the following," and do not alter the contract clause that places on Massand the duty to provide the workers with a safe place to work. In addition, Massand was authorized to "reject means and methods . . . which . . . will constitute or create a hazard . . . to persons or property." Massand Agreement, Section II(C) at SR-3.

Massand's contract with the City incorporated the City's contract with S&B. *See* Massand Agreement, Paragraph 5 at 2. When read together with S&B's contract, Massand had the duty to stop unsafe means and methods of construction.

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In the section of the contract that describes the "Powers of the Resident Engineer, the Engineer, and the Commissioner," the resident engineer and the engineer, both of whom are Massand employees, are given broad powers:

> Article 30. *The Resident Engineer.* The Resident Engineer shall be the representative of the engineer at the site, and, subject to review by the engineer, shall have the power, in the first instance, to inspect, supervise and control the performance of the work . . .
>
> * * *
>
> Article 31. *The Engineer.* The Engineer, in addition to those matters elsewhere herein delegated to the Engineer and expressly made subject to his determination, direction or approval, shall have the power, subject to review by the Commissioner:
>
> (1) to determine the amount, kind, quality, and location of the work to be paid for hereunder;
>
> (2) to determine all questions in relation to the work, to interpret the Contract Drawings, Specifications, and Addenda, and to resolve all patent inconsistencies or ambiguities therein;
>
> (3) to determine how the work of this contract shall be coordinated with work of other contractors engaged simultaneously on this

project, including the power to suspend any part of the work, but not the whole thereof . . .

* * *

The foregoing enumeration shall not imply any limitation upon the power of the Engineer, for it is the intent of this contract that all of the work shall generally be subject to the determination, direction and approval, except where the determination, direction or approval of someone other than the Engineer is expressly called for herein.

* * *

Article 4. *Means and Methods of Construction.* Unless otherwise expressly provided in the Contract Drawings, specifications and Addenda, the means and methods of construction shall be such as the Contractor may choose; subject, however, to the Engineer's right to reject means and methods proposed by the Contractor which: a. will constitute or create a hazard to the work, or to persons or property . . . .

The description of the resident engineer's powers gave Massand the "power . . . to . . . supervise and control . . . the work," and, as engineer, to "suspend any part of the work" and reject means and methods of construction that "create a hazard . . . to persons or property." Agreement, Art. 4 at 32. The powers given to Massand are broad because it is the

"intent of this contract" that "all of the work . . . be subject" to Massand's direction. In addition to the power to reject hazardous means and methods of construction, the contract provided the engineer with other sweeping powers and responsibilities:

> Paragraph 1.06.22. *Contractor's Plant.* The Contractor may occupy with his construction plant any unused location within the area controlled by the Department, subject to the approval of the Engineer. If the Contractor desires to use additional area outside of that controlled by the Department, he shall arrange for such area at his own expense. The location of the Contractor's stationary and mobile equipment shall be subject to the Engineer's approval . . .
>
> The Engineer shall have the right to reject or condemn any plant, apparatus, staging or other appliance which, in his opinion, is unsafe, improper or inadequate. Whether or not the Engineer exercises this right, the Contractors shall not be relieved from his sole responsibility for the safe, proper and lawful construction, maintenance and use of such plant, apparatus, staging or other appliance or for the adequacy of such plant.
>
> All materials shall be properly stacked in convenient places adjacent to the site, or where directed, and protected in a satisfactory manner. All stacking of materials on streets shall be done

in compliance with local laws and ordinances. If it should become necessary to remove and restack materials to avoid impeding the progress of any part of the work, or for any other reason deemed sufficient by the Engineer, the Contractor shall remove and restack such materials, as directed, at his own expense.

* * *

Paragraph J. *Scaffolding and Ladders.* The Contractor shall furnish and securely set scaffolding, platforms and ladders required for the erection and inspection of his work. All such facilities shall be of good, sound materials, adequately dimensioned, substantially braced and tied, and shall be approved by the Engineer.

The contract placed Massand in control of the job site, especially over safety matters. The City made safety a material term of the agreement and gave Massand all powers necessary to enforce safety standards.

Article 36. *Labor Law Requirements.* 3(b). [N]o part of the work, labor or services shall be performed or rendered by the Contractor in any plants, factories, buildings or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract.

> 3(c). Any breach or violation of any of the foregoing shall be deemed a breach or violation of a material provision of this contract, and ground for cancellation thereof by the City.

Massand has suggested that the term "Engineer" in S&B's contract refers to the City, while that same word in Massand's contract refers to Massand. However, the definition section of S&B's contract provides:

> 13. "Engineer" shall means the person so designated in writing by the Commissioner to act as such in relation to this contract, including a private engineer as the case may be.

The Commissioner (defined as the Commissioner of the Department of Transportation or his representative) designated Massand as the "Engineer" in writing when the City signed Massand's contract (after signing S&B's).

> THIS AGREEMENT . . . by and between the City of New York, hereinafter called "The City," acting by and through the Commissioner of Transportation of the City of New York, hereinafter called "The Commissioner," and Nanik Massand, P.E. . . . herein called "The Engineer" . . .

Massand is the "Engineer" in both contracts. This is confirmed by another definition in S&B's contract.

> 21. "Resident Engineer" shall means the representative of the Engineer duly designated by

him in writing to be his representative at the site of the work.

Like its contract with Massand, the City's contract with S&B required S&B to comply with federal, state, and local safety codes. S&B, like Massand, did not know these laws and did not attempt to become familiar with them.

The Performance of the Contracts

Under the contracts as set forth above, S&B was solely responsible for the means and methods of the performing the work on the Project.[2] Massand prepared the plans for the construction of the fender system for both the Third Avenue and 145th Street bridges. In addition to engineering and design services, Massand also performed non-engineering services, including daily on-site inspection of construction activities and safety supervision.

Massand hired a resident engineer to supervise the contract and also hired inspectors to work at each job site to

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2. Section II, entitled Resident Engineering Inspection — General, provides in relevant part:

> C. It is the responsibility of [S&B] and not the responsibility of the engineer, to determine the "Means and Methods of Construction" . . . . However, if the Engineer reasonably believes that the means and methods of construction by the Construction Contractor(s) will constitute or create a hazard to the work, or to the persons or property . . . such means and methods must be reported to the Commissioner or to his duly authorized representative.

supervise and to make sure that the construction work was performed according to the plans and performed safely.

In order to perform its contract and complete the Project, S&B removed the old fender from around the center stanchion of each bridge, excavated the river bottom as needed, and installed the new fender system on each bridge. S&B's contract with the City was on a time and material basis. To accomplish the fender replacement S&B used at least three barges: a crane barge and two material barges. Sometimes S&B had a fourth barge at the job site. The number of barges employed at the job site was S&B's decision.

The crane barge provided working space for the crane, gear, and tools that were needed to pull out the old pilings and timbers, install the new pilings and timbers, and excavate as needed. It provided space for materials and a shanty in which Massand inspectors and engineers occupied a desk. The crane also loaded and unloaded the material barges.

S&B rotated barges using one barge to carry old material away from the job site (the debris barge) and another to carry new material to the job site (the material barge). S&B on occasion placed debris on the material barge before it was emptied of new material. Although S&B usually kept the new material and debris on separate barges, it was standard procedure to dump debris on top of and around new material on the material barge. The old pilings constituted much of the debris. The material and debris barges traveled to and from Port Newark, New Jersey, on a regular basis and were moved from location to location at the job site. The crane

barge and the material barges were necessary and integral to the Project. When removing stone from the river, S&B dedicated a barge to the sole purpose of removing debris. No evidence was presented that would have precluded S&B from doing the same with respect to the debris resulting from the demolition of the old fender system.

The proper way to move pilings to and from the barges is to use timber tongs which resemble outsized ice tongs which are attached to a chain hung from the headache ball of the crane to lift the pile up a foot or so, lower it onto a "sleeper," remove the tongs, wrap a chain, choker, or sling around the pile, and then raise the pile with the crane. A sleeper is a block, usually a piece of wood, used as a wedge or spacer to elevate a load slightly for the purpose of creating room beneath the load to allow a sling or choker to pass under it.

S&B had a Safety Director, Eugene Reardon ("Reardon"), who reported to the company's safety committee and drafted S&B's safety handbook and safety manual and organized the weekly distribution of safety memos to the workers at the job site. Reardon had no training in construction site safety.

Robert Branston ("Branston") was the S&B project superintendent for the fender system repair, and the senior-most S&B employee at the job site in charge of safety. He had no training in construction site safety.

Gerhard Holzheuer ("Holzheuer") was the S&B foreman for the Project and Gravatt's immediate superior. He also

lacked training in the New York Labor Law, New York Industrial Code, and OSHA. His safety training was limited to the information contained in weekly safety memos that were sent to him by Reardon to be read to the workers every payday.

Reardon, Branston, and Holzheuer had never seen the contract with the City and did not know what safety codes applied to the job. Branston testified that he "went through" the contract, but he also testified that he had no training in construction site safety, including the New York Labor Law, New York Industrial Code, and OSHA. Branston did not attend the weekly safety meetings, although required to do so, and did not read S&B's safety handbook until sometime after Gravatt's injury. S&B never asked Reardon to review the contract from a safety director's point of view.

The City knew or should have known that its contractors were not familiar with the safety provisions of the contract. The Project Engineer for the Bridge Component Rehabilitation Section of the Department of the Transportation of the City, Jose Cubelo ("Cubelo"), advised S&B and Massand that S&B was working in an unsafe manner, and also advised Henry Smith, Acting Director of the Bridge Component Rehabilitation Section ("Smith"). The City took no action to enforce the S&B or Massand contracts.

The City had no safety program in place and made no effort to ensure that safety was observed at the job site.

Cubelo told Branston of S&B and Forde Coppin, the resident engineer of Massand ("Coppin"), that the working

conditions at the job site probably violated OSHA. Branston's response was that, if the City wants the job done, this is how they do it. Other than reporting to Smith, Cubelo did nothing when given this response.

The City was advised on September 7 and September 9, 1994, that too many men were getting hurt on the job. S&B's safety committee also believed that the 145th Street Bridge was the site of numerous personnel accidents.

On August 12, 1994, a worker was hurt on the job. At a progress meeting held on September 7, 1994, Coppin advised all in attendance, which included management personnel from all three defendants, *i.e.*, Massand's project engineer Ayman Baki ("Baki"), the head of the City's Bridge Rehabilitation program John Hendrickson ("Hendrickson"), and S&B's superintendent Branston, that too many men were getting hurt on the job.

Nine days after the September 7th progress meeting, another worker, Gunnar Berg, fell on the fender system. Work procedures were not altered, and no safety practices were implemented at the job site.

On January 31, 1996, the day of Gravatt's accident, Jodh Singh, the Massand inspector who was on duty at the job site ("Singh") left at lunch time without obtaining a replacement. He did not return until about 3:00 p.m. There were twelve S&B workers at the Project.

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The Accident

Shortly after lunch on January 31, 1996, foreman Holzheuer instructed Gravatt and his co-worker, Thomas Liming ("Liming"), to go onto a barge where S&B had mixed new material and demolition debris, to move several old piles that were obstructing access to two drafts of new lumber still on the barge. The drafts of lumber were the only new material remaining on the barge. Four lifts of new material had been completed previously that day. The rest of the barge was full of debris, and it was towed away the following day. Gravatt's and Liming's normal job duties did not include moving material on barges. It was another employee's job at the site to move this kind of debris, a "deck man" named Richard Sada.

The old piles that were obstructing access to the new drafts of lumber had been dumped on top of or near the new material by S&B's crane operator and deck man but the decision to mix debris with new material was made by Holzheuer. The stowage of the old piles resembled a giant game of "pick up sticks." Holzheuer instructed Gravatt and Liming to use the timber tongs and swing the pile over.

Jack Bombace, the S&B crane operator ("Bombace"), was in the crane on the crane barge. The crane barge was secured to the fender, and the material/debris barge on which Liming and Gravatt were working was tied to the crane barge. Bombace could not see Gravatt who was in the pile of debris about 60 or 70 feet away from Bombace. Gravatt could not see Bombace and did not give any signals to the crane operator. Gravatt climbed on the debris and reached to attach

the timber tongs on a twelve foot piling at a location about one-third the length of the piling. Bombace received one signal which he construed as a signal to swing the pile out of the debris heap, and Liming gave that signal. Bombace believed that Gravatt was on the other side of the draft of new lumber, and not in the debris heap. Liming did not use the hand signals specified in S&B's safety handbook. The signal that Liming would have used to direct Bombace to stop lifting was similar to the signal in the safety handbook for hoisting.

The pile was raised about ten feet in the air. As the pile was hoisted, the end of it became stuck in some of the debris on the barge. Gravatt was on the top of the draft of new lumber, about eight feet above the deck and turning away as the piling rose. Bombace was about to swing the pile away from the debris heap when the pile pulled through the tongs. Gravatt heard Liming yell "look out" and looked over his shoulder and saw the pile falling. The piling fell and hit another piling which bounded up and struck Gravatt in the back of the legs, knocking him from the top of the draft of lumber some 25 feet into the Harlem River.

The workers rescued Gravatt from the near freezing waters of the Harlem River, took him into the shanty, stripped him of his clothes, and placed him next to the heat.

Gravatt waited about half an hour for the ambulance to arrive. He complained of pain from his knees to his ankles. When the ambulance finally arrived, the medics refused to go down to the shanty to treat him. He was lifted in the crane bucket about 40 feet to the ambulance waiting on the bridge

roadway. Gravatt was taken to Lincoln Hospital where he was advised that he suffered injuries to both his ankles and right knee.

The Unsafe Practices

There is an industry-wide practice to use timber tongs only when the material to be lifted is picked up no more than 2 to 3 feet, enough to allow the worker to put a sleeper underneath the material and then rehook the material using a cable sling or chain sling.

Although Massand's inspector, the City's project manager, and S&B's safety director, superintendent, and foreman all testified that it was unsafe to raise a pile with timber tongs, Bombace, the crane operator and a credible witness, said that this was a common practice at S&B's work sites. In his 30 years as a crane operator, Bombace has seen timber tongs used in the fashion employed here only at S&B job sites.

The manner in which the debris was loaded on top of and near the good material was in direct violation of S&B's own safety policy, as contained in its safety handbook and its safety memos. S&B's safety handbook, which Reardon wrote, required that stored materials be readily accessible. The handbook states that materials are to be properly stored so as to provide clear walkways for access to material.

S&B's safety handbook and safety memos required the company to observe good housekeeping practices at job sites. The mixing of debris and new material in a manner that

obstructed access to the new material was a violation of good housekeeping. Reardon testified that the storage of new material on a debris barge would be a violation of good housekeeping.

The manner in which the debris piles were stowed on top of and near the good material created a foreseeable safety hazard. S&B's safety handbook and safety memos emphasize the connection between poor job site housekeeping and personal injuries. According to one memo, the "benefits [of good housekeeping] include accident reduction. . . ." Another memo states that proper material storage reduces "material handling accidents." Proper material handling, states another memo, "is a controlling factor in survival for yourself and co-workers as well." The safety handbook sums it up as follows: "Good housekeeping is the basis for a safe work environment. . . ."

Massand was contractually obligated to provide the workers with a safe work environment and, therefore, good housekeeping was one of Massand's duties. The testimony of Massand's inspectors and the daily records they maintained indicate that they frequently gave orders relating to good housekeeping at the 145th Street Bridge job site with respect to the condition of walkways in inclement weather.

S&B conducted weekly safety meetings at its job sites. These meetings were usually conducted during the employees' lunch hour on payday. S&B sent safety meeting memos to the job site with paychecks to be distributed by Holzheuer and they were ordinarily read to the men by the shop steward during lunch hour on payday. It was S&B's

practice to have each employee in attendance at the meetings sign the safety memo to show that the employee was present when the memo was read aloud. The Massand inspector did not attend the safety meetings, and Massand did not require him to do so. Bombace, the crane operator on the job site, sometimes attended the safety meetings, but never signed the safety memos because S&B's superintendent, Branston, told him, with respect to the safety memos: "[Y]ou realize we can't work this way, it would slow things down too much. So nobody ever said anything, but I told him no, I refuse to sign it. You can't tell me to sign something saying I'm going to work one way and then tell me to work a different way. So I refused to sign it." (Bombace Tr. Trans. at 173).

The safety meeting memos supplied to the employees were provided to S&B by a subscription service. These memos were designed for the construction industry, but not for marine construction. None of the memos were ever altered or edited by anyone at S&B. The supervisory personnel, including Reardon and Holzheuer, never considered amending the memos. None of the memos discussed barges, working conditions on barges, or safety precautions relating to barges.

A safety memo about timber tongs was received only after Gravatt's injury. In the several hundred safety memos produced by S&B there was no prior reference whatsoever to the use of timber tongs. The safety meetings and memos failed to satisfy the safety requirements of the contracts between the City and S&B and Massand.

Matthew Quesada, a dock builder who worked for S&B, was the shop steward for most of the time he worked for

S&B and complained about safety to S&B and Massand. He believed that S&B was an unsafe company. Quesada was laid off in late 1995.

Because S&B had operational control of the site and the means by which the work was performed, it is primarily liable for Gravatt's damages as between S&B and Massand. Massand's negligence was primarily supervisory.

The Injuries

Gravatt was admitted to Lincoln Medical Center on January 31, 1996, at 3:15 p.m., about two hours after the accident. The records of Lincoln Medical Center indicate that Gravatt experienced pain to both lower extremities upon flexion and extension. The Trauma Sheet indicates that Gravatt was experiencing pain in both knees and both ankles.

According to x-rays taken by Lincoln Medical Center of Gravatt's right tibia, left tibia, and both ankles, Gravatt suffered fractures of his right leg below the knee and the right ankle. Lincoln Medical Center's records also indicate that Gravatt had tenderness in and about the left ankle with edema.

The relevant bones in the left ankle are the tibia, which is the large bone in the leg and the fibula, which is the small bone in the leg; the talus, which is the ankle bone at the top of the foot and the calcaneus, which is the heel bone. The fibula and the tibia form an arch around the talus called the "mortise." The fibula is on the outside (lateral) side of the ankle and where it frames the talus is called the lateral

malleolus. On the inner part of the ankle is the medial malleolus which is formed by the end of the tibial bone. The calcaneus is the heel and the connection between the calcaneus and the talus is called the sub-talor joint.

The day after the accident, February 1, 1996, Gravatt saw Dr. Frederick DePaola, the orthopedist usually consulted by the Gravatt family. Gravatt was in a wheelchair, complaining of severe pain in the left ankle, and had limited motion in the left ankle due to swelling and pain.

On February 8, 1996, the Jersey Shore Medical Center conducted a bone scan which showed areas of increased uptake of technetium in the lateral tibial condyle of the right knee and in the left talus. Gravatt had possible fractures in and about the areas of increased uptake.

On February 20, 1996, Dr. Karmel, a radiologist, conducted a CT scan of Gravatt's right knee, which indicated a minimally displaced proximal fibula fracture that appeared to be focally comminuted and a CT scan of Gravatt's ankles, which indicated that there was a lucent line through the posterior lip of the distal tibia. In addition, there was soft tissue swelling present about the left distal tibia and a slight irregularity of the anterior margin of the distal tibia that may have been a small avulsion fracture.

On April 11, 1996, Gravatt returned to Dr. DePaola for the seventh time in two and a half months, still complaining of limited motion and swelling in the left ankle. Dr. DePaola recommended an MRI of the left ankle and talus.

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On April 16, 1996, the New Jersey Diagnostic Imaging & Therapy performed an MRI of Gravatt's left ankle, which indicated a healing tear of the anterior talofibular ligament, an irregularity of the talar dome, and a possible tear of the posterior tibiotalar ligament.

On May 9, 1996, Dr. DePaola noted that Gravatt was doing well, except for the left ankle, and that he experienced diffused soreness and swelling in the left ankle when he tried to walk.

On May 22, 1996, Gravatt was sent to Dr. Christopher Johnson for a second opinion. Dr. Johnson found that: (1) the left ankle mortise was well-reduced; (2) there were irregularities involving both the medial and lateral malleoli; and (3) the talus was reduced. Dr. Johnson believed that, after a crush and/or soft tissue injury involving the ankle, more clinical improvement would have been expected. He believed that there were multiple etiologies to consider, including intra- and extra-articular sources within the joint and outside the joint, as the cause of the problems. Dr. Johnson's diagnosis included a fracture involving the left ankle, peroneal tendinitis, and arthrofibrosis.

On July 11, 1996, Dr. DePaola referred Gravatt to Dr. Walter Pedowitz, an ankle and foot specialist, because Dr. DePaola felt that Gravatt had a complicated foot problem.

Dr. Pedowitz began specializing in foot and ankle surgery after he concluded his residency in 1976. He is the Associate Editor of Foot and Ankle International (the official journal of the American Orthopaedic Foot and Ankle

Society), an author of 11 articles on foot and ankle surgery and other topics relating to the foot and has been lecturing in the U.S. and abroad on foot and ankle surgery. He teaches foot and ankle surgery at the College of Physicians and Surgeons, Columbia University, The College of Medicine and Dentistry in New Jersey, and Seton Hall Medical School. Dr. Pedowitz is a sub-specialist in foot and ankle surgery.

In July 1996, after evaluating Gravatt orthopedically and reviewing several diagnostic tests, Dr. Pedowitz concluded that he had a problem in the area of his foot called the sinus tarsi, the hollow or canal formed by the groove between the heel bone and ankle bone. Further, Dr. Pedowitz concluded that Gravatt had problems with a tendon on the inner side of his foot as well as having pain in the left ankle.

Dr. Pedowitz injected the area of the ankle and foot that was painful. The injection relieved the pain, indicating that there was some instability or inflammation in the subtalar joint, which is the joint between the talus and the calcaneus.

Dr. Pedowitz recommended a course of treatment after Gravatt's first visit: (1) if the ankle improved with the injections, the treatment would end there; (2) if the injections did not work, he would remove the inflamed tissue in the sinus tarsi area, and stabilize the lateral ankle; and last, (3) if the removal of tissue and stabilization did not work, he would fuse the subtalar joint and make that joint solid to prevent pain.

On August 30, 1996, Rahway Hospital Imaging took an x-ray of Gravatt's left foot which indicated degenerative

changes at the subtalar joint, talonavicular joint, and ankle itself caused by traumatic injury.

On September 6, 1996, Dr. Pedowitz performed the first of three operations on Gravatt at Rahway Hospital: a sinus tarsi clean out with peroneal brevis tenodesis and posterior tibial tenolysis. Gravatt was placed in a cast for nine (9) weeks following the first operation.

On March 18, 1997, about six (6) months after the first operation, when it became clear that Gravatt was not getting the result Dr. Pedowitz had anticipated, Dr. Pedowitz performed the second operation, a subtalar arthrodesis, meaning a fusion of the talus, the ankle bone, and the calcaneus, the heel bone. At this time, a bone graft was taken from the upper portion of the tibia, or leg bone. Gravatt was in a non-weight bearing cast for 6 weeks following the second surgery, followed by a weight bearing cast for another 6 weeks. After the second operation, the subtalar pain was completely gone.

On July 23, 1997, four months after the fusion surgery, Gravatt started to complain of pain and discomfort in the posterior aspect of the left ankle.

Dr. Pedowitz felt that the pain was related to a loose bone in the back of the ankle called the os trigonum which Gravatt had had since birth and had become a secondary center of calcification in the talus.

On February 9, 1998, Dr. Pedowitz performed a third surgery on Gravatt to remove the os trigonum bone that

became symptomatic as a result of the injuries suffered on January 31, 1996. Gravatt was again placed in a cast for nearly a month following the third surgery.

At that time, Dr. Kline, Dr. Pedowitz's partner, performed arthroscopic surgery on Gravatt's left knee to repair a torn medial meniscus, which was causally connected to the left ankle injury.

Since January 31, 1996, Mr. Gravatt's main complaint has been pain in and about the left ankle in the area called the syndesmosis, a group of tight ligaments that hold the tibia and fibula together.

Dr. Pedowitz has planned one or two more surgeries for Gravatt, which will include a tenolysis of the syndesmosis; and if that does not relieve Gravatt's pain, then a fusion of the fibula and tibia above the ankle joint may be required in order to clean out or fuse the ankle joint itself. Dr. Pedowitz expects to achieve his treatment and surgical goals after Gravatt's anticipated future operation.

The cost of the tenolysis of the syndesmosis will be about $12,000. The cost of the tibia and fibula fusion will be about $25,000. Any future operations will also require physical therapy afterwards, and additional cost.

Dr. Pedowitz' diagnosis of the problem in the sub-talor joint was that Gravatt had sub-talor arthritis/instability and because of the sub-talor arthritis, he fused the calcaneus to the talus. Some arthritis found in the sub-talor joint pre-existed the injury, as a result of a 20-year old left ankle

fracture at the lateral malleolus suffered by Gravatt while playing basketball.

Dr. Pedowitz concluded that Gravatt's injuries were caused by a crush injury to the foot resulting in an instability of the sub-talor joint, although there is nothing on the diagnostic films taken of Gravatt's left ankle that showed a crush injury. Since he had seen Gravatt well after the injury, he relied upon the facts of the accident as related to him to establish the effect of the injury.

On January 7, 1997, Dr. Stephen Allan examined Gravatt on behalf of the NYC Carpenter Benefit Fund. Dr. Allan's report indicates that: (1) the left hindfoot and ankle has marked loss of motion; (2) there is subtalar pain; and, (3) there is peroneal spasm. Dr. Allan suggested that a subtalar arthrodesis would be appropriate. The defendants did not call Dr. Allan to testify at trial.

On February 5, 1997, Dr. Alexander Fasulo examined Gravatt on behalf of Lamorte Burns & Co., Inc., S&B's agent. Dr. Fasulo's report indicates that Gravatt complained of "significant pain in the left ankle and foot, where gross restriction of range of motion is present, inability to walk without external support, nocturnal distress to the left ankle and foot, [and] continuous need for pain medication." Dr. Fasulo also wrote that the medical records he reviewed were "replete with extensive and intensive follow-up notes describing treatment by several physicians, completely corroborating Mr. Gravatt's subjective history." Dr. Fasulo noted that Gravatt used a cane and was limping severely, and that Gravatt's complaints were related to his left foot

and ankle. Dr. Fasulo measured Mr. Gravatt's calves and noted that the circumference of the left calf measured one-half inch less than the right. Dr. Fasulo reviewed the x-rays and noted significant amounts of articular and periarticular hypertrophic degenerative changes about the left ankle, the subtalar and the talonavicular joints. Dr. Fasulo concluded that Gravatt was injured "quite severely at the time of the accident in question, including musculoskeletal and articular injuries." Dr. Fasulo further reported to S&B that Gravatt had reached maximum benefit from conservative treatments; that the left extremity sustained severe soft tissue injuries which became diagnosable only after the acute edema subsided, and that the accident caused articular cartilage and synovial degenerative changes. Lastly, Dr. Fasulo agreed with Dr. Pedowitz's recommendation for an additional surgical procedure to be performed on Gravatt's left ankle, stating, "I am in full agreement about the need of this final procedure to relieve mobility pain and stabilize the arthrotic ankle, sub-talar and Talo-navicular joints." Dr. Fasulo was not called by defendants.

On January 26, 1998, Dr. Henry Magliato examined Gravatt on behalf of S&B. Dr. Magliato reported that Gravatt had suffered a number of injuries as a result of the accident of January 31, 1996, the most severe of which focused on the left ankle, and that Gravatt was still impaired for all of the duties required of a dock builder because the occupation requires full use of both lower extremities.

The only medical testimony contrary to that of Dr. Pedowitz, with respect to the injury and causation, was that of Dr. Maurice Carter, an orthopedic surgeon called by S&B.

Dr. Carter is not a foot and ankle specialist and lacks Dr. Pedowitz's credentials. His testimony denying a causal connection was unpersuasive.

The injuries and resulting operations will cause: (1) increased aging at a more rapid rate of the surface of the ankle joint and the joints in the foot; (2) arthritis; (3) post-traumatic degenerative changes; and, (4) problems with the knees, hips, and lower back.

Gravatt walks with a limp, which is permanent. The limp places stress on all the adjacent joints in the lower extremities on both sides, as well as the lower back. Gravatt will continue to experience pain at rest, pain with use, and weather ache in the foot, the ankle, the knee, and low back on a permanent basis.

Gravatt's injuries to his right and left knees and ankles, all of the treatment he received to his ankles and knees since the day of the accident, and the future difficulties Dr. Pedowitz described as set forth above were directly and proximately caused by the accident.

Economic Loss to Date

As a marine carpenter, Gravatt was a beneficiary of a collective bargaining agreement which, as of July 1, 1997, was paying $28.68 per hour. Although there is evidence of the rate of prior wages before 1997, there is no evidence of what the wages would have been in 1998. Since it has been three years from the date of injury, it can be inferred that July 1, 1997 being the midpoint of the three years, the rate

in effect as of that date would average out the rates before that date and after that date. Accordingly, for purposes of calculating past lost wages, $28.68 per hour is an appropriate rate. Using that rate applied to 1431 hours per year, Gravatt's past wage loss amounts of $41,041.08 per year. He incurred approximately $7,302.52 per year in work expenses. He further incurred approximately $10,670.68 in taxes.

Under his collective bargaining agreement, Gravatt was also entitled to fringe benefits, including payments for welfare, pension annuity and vacation. He is now the beneficiary of Social Security benefits. His total fringe benefits were in the amount of $21.78 per hour as of July 1, 1997, which can be used as the average for the last three years of which $2.19 was Social Security contributions. Accordingly, the total annual gross loss in salary and fringe benefits was $69,346.26 per year (1,431 x $ 48.46). In addition, there are past medical expenses of $46,425.71 as yet unpaid.

Gravatt's life expectancy was 37.6 years from the date of the injury. His work life expectancy at the time of the accident was 22.49 years, which was reduced to 11.04 years after the accident. His annual salary plus fringe benefits is set forth above. Gravatt seeks to return to work. He did not graduate from high school and has a learning disability, and he has not sought to obtain a General Equivalency Diploma. In New Jersey, there are approximately 7,800 jobs that Gravatt now qualifies for with his disabilities. These jobs represent only 1/3 of 1% of all of the jobs available in New Jersey. Gravatt should be able to obtain a job earning a yearly salary (before taxes) of $20,000 with work expenses of $2,000.

A discount of 2% is appropriate. *See Doca v. Marina Mercante Nicaraguense S.A.*, 634 F.2d 30, 40 (2d Cir. 1980); *Roselli v. Hellenic Lines Ltd.*, 524 F. Supp. 2, 4 (S.D.N.Y. 1980). In the absence of credible contrary evidence, a district court may use a 2% rate as the discount rate in personal injury cases. *See McCrann v. United States Lines, Inc.*, 803 F.2d 771, 775 (2d Cir. 1986).

In addition, Gravatt will incur the likely cost of future vocational expenses of $34,249, and future surgical expense of $37,000.

Although Gravatt seeks to recover the loss of household services, the proof has failed to establish that he cannot perform such services.

Contributory Negligence

Although Gravatt knew and should have known that the work he was performing with the timber tongs was being done in a hazardous fashion, he was directed by Holzheuer to use the timber tongs and to perform the task in the manner which resulted in his injury.

Pain and Suffering

On the day of the accident Gravatt experienced excruciating pain. All the dock builders who saw Gravatt after the accident testified that he was in great pain. Bombace said that Gravatt was "oblivious" with pain. (Bombace Tr. Trans. at 183). In addition to the pain caused by having his ankles crushed by the falling pile, Gravatt experienced pain,

anxiety, and the fear of drowning or freezing to death when he plunged into the Harlem River wearing his clothes and heavy tool belt with currents threatening to sweep him down river.

After the accident, he was confined to a wheel chair for 5-6 weeks and wore casts for 6-8 weeks. After the casts were removed, he walked on crutches or with a cane for about six (6) weeks and underwent painful physical therapy three (3) times a week for at least four (4) weeks.

In September 1996, Dr. Pedowitz operated on Gravatt's left foot. After the operation, he was experiencing searing pain. He wore a cast for about nine (9) weeks after the operation and then went to physical therapy again for another twelve (12) weeks. The operation did not resolve his problem and he continued to experience pain, and walked with crutches or a cane.

He went for a second operation in February 1997, and again experienced great pain after the operation. He was bedridden for a week, and he wore casts again for another twelve (12) to fifteen (15) weeks after the second operation, and went for physical therapy three (3) times a week after the cast was removed.

The second operation did not relieve his pain and he had a third operation in March 1998. Again, he experienced pain after the operation, wore casts for eight (8) weeks, and then underwent physical therapy for a month.

Dr. Pedowitz testified that Gravatt will need one, possibly two more operations.

Appendix B

Gravatt was an outdoorsman. He worked outdoors and spent much of his free time hunting and fishing. His hunting and fishing is now limited as a result of his limp and his difficulty walking. He shared his enthusiasm for outdoor recreation with his family, particularly his teenage son. He also played baseball and raced miniature sports cars with his son, and played soccer with his teenage daughter. These activities are no longer possible for him because of his disability. Gravatt's wife described him as a good husband and good father who has become short-tempered and impatient with his family, and even withdrawn, from his wife and children since the accident.

Gravatt's past pain and suffering would be fairly compensated by an award of $300,000. He will also endure pain and suffering in the future for the next twenty-five years for which he should be compensated in the amount of $200,000.

Damages of Mrs. Gravatt

Mrs. Gravatt is entitled to recover damages for loss of consortium for the past as well as the future. Loss of consortium includes loss of services, love and affection, companionship, society, sexual relations, disposition and temperament in the social life and comfort and happiness of members of the family. *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 293 N.Y.S.2d 305, 239 N.E.2d 897 (1968).

Immediately after the accident, Gravatt was in a wheel chair for approximate 5-6 weeks. During this time, Mrs.

Gravatt had to care for her husband's personal needs. After the accident and during this treatment, his children also had to "wait on him." (D. Gravatt Tr. Trans. at 495). While Gravatt was confined to a wheel chair after the accident, Mrs. Gravatt was not able to sleep with her husband. Gravatt had to sleep on the first story of the house in his son's bed, while Mrs. Gravatt slept on the couch in their first floor living room, so that Gravatt could get her attention if he needed her help.

Mrs. Gravatt had a good relationship with her husband before the accident. They have been married for seventeen years. After the accident, when it became apparent that Gravatt would not be able to go back to dock building, he became withdrawn from his wife and children. Both Gravatt and Mrs. Gravatt are seriously depressed.

Mrs. Gravatt began to drink heavily and sought counseling for depression. She suffers from the stress of acting as mediator between her children and husband, and working full time. She has been prescribed medication and has lost weight, and appetite, and has had difficulty sleeping since the accident.

Before the accident, Delores and Steven Gravatt enjoyed a good sexual relationship. Their intimate relationship has changed because of Gravatt's injuries and limitations, and the added pressures upon Mrs. Gravatt.

Mrs. Gravatt's relationship with her children has changed. She does not have the time she did before to sit with her children and give them affection. Mrs. Gravatt's

personality has changed. She used to be fun and happy, tactful. Today, she is depressed and has lost the patience she once had.

The Gravatts have stopped seeing their friends, stopped attending family gatherings and summer outings. There have been no family vacations as there had been prior to Gravatt's injury.

Mrs. Gravatt's loss of consortium would be fairly compensated by an award of $200,000: $100,000 for her loss to date and $100,000 for the loss she can anticipate for the next fifteen years.

CONCLUSIONS OF LAW

Jurisdiction

Subject matter jurisdiction over this action exists under 28 U.S.C. §§ 1333 and 1367. Although the April 6 Opinion dismissed the Gravatt's claim under the Jones Act, 46 U.S.C. § 688, maritime jurisdiction remains under the Gravatt's claims under general maritime law. In addition, discretionary jurisdiction, 28 U.S.C. § 1367, also exists on the basis of judicial economy and the familiarity with the proceedings over the more than two year period this case has been pending. *See Purgess v. Sharrock*, 33 F.3d 134 (2d Cir. 1994); *ABF Capital Management v. Askin Capital Management, et al.*, 957 F. Supp. 1308 (S.D.N.Y. 1997).

Appendix B

The Gravatts are Entitled to Recovery Against the City and Massand Under the Labor Law

For the reasons set forth in the April 6 Opinion, the New York State Labor Law is not preempted by federal maritime law, and the City and Massand are liable to Gravatt under §§ 200, 240, 241. The City's liability results from its status as the owner of the 145th Street Bridge site. Massand's negligence under the Labor Law is not professional malpractice, *i.e.*, negligence as an engineer, but rather, it is ordinary negligence arising out of its failure to supervise and control the performance of the work and the condition of the job site, and its failure to train its inspectors adequately in construction site safety.

New York Labor Law § 240(1) provides as follows:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.
>
> No liability pursuant to this subdivision for the failure to provide protection to a person so

> employed shall be imposed on professional engineers . . . who do not direct or control the work for activities other than planning and design.

Labor Law § 240 obligates the owners and contractors, and their agents, to make sure that the workers perform their jobs safely, at least when fall hazards are involved. *See Sheridan v. Beaver Tower, Inc.*, 229 A.D.2d 302, 644 N.Y.S.2d 739 (1st Dep't 1996). The law is to be construed as liberally as possible to effectuate its purpose. *See Buckley v. Radovich*, 211 A.D.2d 652, 621 N.Y.S.2d 638 (2d Dep't 1995); *Gordon*, 82 N.Y.2d 555, 559, 606 N.Y.S.2d 127, 129, 626 N.E.2d 912, 914 (1993).

The City is liable to Gravatt under Section 240 of the Labor Law, known as the Scaffold Law, because it was the owner of a job site (the 145th Street Bridge) where construction was taking place, and Gravatt was, at the time of the accident, working at an elevated workplace — namely, the pile of debris and the draft of lumber which stood on the deck of the debris barge. *See Gordon*, 82 N.Y.2d 555, 606 N.Y.S.2d 127, 626 N.E.2d 912; *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 577 N.Y.S.2d 219, 583 N.E.2d 932 (1991). In addition to working at an elevated location, the use of a crane to hoist material over the heads of Gravatt and Liming makes § 240 of the New York Labor Law applicable because it exposed Gravatt to the type of gravity-related risk that § 240 was specifically designed to correct. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501, 601 N.Y.S.2d 49, 53, 618 N.E.2d 82, 86 (1993).

> Labor Law § 240(1)'s list of *required* safety devices . . . evinces a clear legislative intent to

> provide "exceptional protection" for workers against the "special hazards" that arise when the work site is . . . below the level where "materials or load [are] hoisted and secured" . . . . [T]he "special hazards" referred to are limited to such specific gravity-related accidents as . . . *being struck by a falling object that was improperly hoisted or inadequately secured*. . . .

Ross, 81 N.Y.2d at 501, 601 N.Y.S.2d at 52, 618 N.E.2d at 85-86 (emphasis added).

The Scaffold Law obligates "all contractors and owners and their agents" to "furnish or erect or cause to be furnished or erected . . . scaffolding, hoists, . . . ***slings***, . . . and other devices . . . to give proper protection to a person so employed." (Emphasis added.) Here, there was a failure to provide Gravatt with the sling necessary to perform his assigned job safely. The failure to use a sling violated § 240, § 241(6), and § 200 of the New York Labor Law, violated an industry-wide standard of care, and was one of the causes of the accident.

The City and Massand are also liable to Gravatt under Section 200 of the Labor Law, which provides:

> All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and

> devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons. The board may make rules to carry into effect the provisions of this section.

As found above, the 145th Street Bridge was an unsafe work site and, based on the testimony of Cubelo, all of the defendants were on notice of this condition. In addition, S&B routinely mixed debris and new material on the same barge, an unnecessary and unsafe practice that created an unsafe condition that the City and Massand accepted. S&B also regularly used timber tongs in an unsafe manner and in this instance, timber tongs were used in an unsafe manner aboard a barge that was in an unsafe condition.

Section 200 of the Labor Law codifies the common law duty imposed on property owners, contractors, and their agents, to provide workers with a safe place to work. *See Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343, 352, 670 N.Y.S.2d 816, 821, 693 N.E.2d 1068, 1073 (1998); *Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 316-17, 445 N.Y.S.2d 127, 129, 429 N.E.2d 805, 807 (1981). This duty falls on those who supervise or control the work. "An implicit precondition to this duty to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." *Russin*, 54 N.Y.2d at 317, 445 N.Y.S.2d at 129, 429 N.E.2d at 807.

In this case, the City and Massand supervised and controlled the work, including the mixing of debris and new

material on the same barge, and the use of timber tongs to hoist material. Both the City and Massand knew or should have known of the unsafe practice of using timber tongs to hoist material, and the unsafe condition created by mixing debris with new material on the same barge. The City and Massand had the authority to alter these practices and conditions. The City's and Massand's failure to correct these unsafe practices and conditions caused or contributed to the accident that injured Gravatt. The City's and Massand's failure to train their employees in construction site safety, particularly the rules and regulations promulgated under the New York Labor Law and Industrial Code, also constituted a cause of the accident, as was their failure to take corrective action once they were put on notice of S&B's unsafe, hazardous, and dangerous manner of working.

The City and Massand are also liable under Section 241(6) of the Labor Law, which provides:

> All contractors and owners and their agents, except owners of one and two- family dwellings who contract for but do not direct or control the work, when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
>
> * * *
>
> 6. All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable

> and adequate protection and safety to the persons employed therein or lawfully frequenting such places. The board may make rules to carry into effect the provisions of this subdivision, and the owners and contractors and their agents for such work, except owners of one and two-family dwellings who contract for but do not direct or control the work, shall comply therewith.

Section 241(6) is similar to both § 240 and § 200. Like § 200, § 241(6) reiterates the common law duty to provide a safe place to work. Also like § 200, § 241(6) does not contain specific safety measures. The specific safety measures that must be observed are enacted by the New York State Commissioner of the Department of Labor and are contained in the New York State Industrial Code (the "Industrial Code") found in the Codes, Rules and Regulations of the State of New York, volume 12. (12 Labor NYCRR.); *see also Ross*, 81 N.Y.2d at 501, 601 N.Y.S.2d at 53, 618 N.E.2d at 86.

The use of timber tongs, instead of a sling, violated an industry-wide safety standard. It also violated § 1981.81 of OSHA, 29 CFR § 1981.81, as well as Industrial Code §§ 23-1.5(c)(2), 23-2.1, 23-3.3(k), 23-6.1(d), 23-6.1(e), 23-8.1(e)(3), 23-8.1(f)(1)(iv), 23-8.1(f)(2)(ii), and 23-8.2(c)(3). The manner and practice of loading debris on top of, and near, the good material were in direct violation of S&B's own safety policy. It also violated § 1918.91 of OSHA, 29 CFR § 1918.91, and §§ 23-2.1(a)(1), 23-2.1(b), 23-3.3(k)(1)(ii) of the Industrial Code.

Industrial Code § 23 incorporates the broad fall prevention goal of § 240(1):

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§ 23-1.2 Finding of fact.

The board finds that the trades and occupations of persons employed in construction, demolition and excavation operations involve such elements of danger to the lives, health and safety of such person and of persons lawfully frequenting the areas of such activities as to require special regulations for their protection in that such persons are exposed to the following:

(a) The hazards of falling and of falling objects and material. . . .

(e) The hazards incidental to the handling and movement of heavy materials. . . .

The following Industrial Code regulations were violated:

§ 23-2.1 Maintenance and housekeeping.

(a) Storage of material or equipment. (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare. . . .

(b) Disposal of debris. Debris shall be handled and disposed of by methods that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area.

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The new material that Gravatt and Liming were attempting to free was not stored in a safe and orderly manner, and the debris that was dumped haphazardly on or around the new material endangered the workers.

§ 23-3.3(k) Storage of materials.

(1) General. . . .

> (ii) Storage areas shall not interfere with access to any stairway or passageway used by any person as a means of ingress or egress. Suitable barricades shall be provided to prevent stored materials from sliding or rebounding into any areas where any person is located or passing. All materials shall be safely piled in such locations as will not interfere with any work operations nor present any hazard to any person employed at or frequenting the demolition site.

By mixing debris and new material, S&B, the City's contractor, interfered with the work operations in a way that required workers to move around and climb on unstable piles of debris to gain access to the new material needed to work. This type of unnecessary hazardous storage was, unfortunately, routine at the 145th Street Bridge job site.

§ 23-6.1 General requirements.

* * *

(d) Loading. Material hoisting equipment shall not be loaded in excess of the live load for which

> it was designed as specified by the manufacturer. Where there is any hazard to persons, all loads shall be properly trimmed to prevent dislodgment of any portions of such loads during transit. Suspended loads shall be securely slung and properly balanced before they are set in motion.

This provision of the Industrial Code was violated because equipment used for hoisting the timber tongs were not designed to perform that task, was inadequate for the load it was meant to carry, the load was not trimmed and balanced to prevent dislodgment and a proper sling was not used.

> *§ 23-8.1 General provisions.*
>
> (e) Load handling. . . .
>
> > (3) Where slings are used to hoist material of long length, spreader bars shall be used to space and keep the sling legs in proper balance. . . .
>
> (f) Hoisting the load. (1) Before starting to hoist with a mobile crane, tower crane or derrick the following inspection for unsafe conditions shall be made. . . .
>
> > (iv) the load is well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches.

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(2) During the hoisting operation the following conditions shall be met: . . .

(ii) The load shall not contact any obstruction.

Section 23-8.1(f)(1) also echoes section 240(1) in requiring the material to be in a sling or lifting device and section 23-8.1(f)(2) was also violated in that the pile that Gravatt and Liming were lifting was stuck in or came into contact with other debris piles, which caused or contributed to the slippage of the pile from the tongs and no tag or restraint line was used as required.

§ 23-8.2 Special provisions for mobile cranes.

* * *

(c) Hoisting the load. (3) . . . Loads lifted by mobile cranes shall be raised vertically so as to avoid swinging during hoisting except when such operations are permitted by the capacity chart. A tag or restraint line shall be used when rotation or swinging of any load being hoisted by a mobile crane may create a hazard.

Under the Scaffold Law and the other cited sections of the Labor Law, certain agents, such as engineers and architects, are not liable unless they supervise or control the work, or liability is imposed on them by clear contractual provision. *See Brooks v. A. Gatty Service Co.*, 127 A.D.2d

553, 554, 511 N.Y.S.2d 642, 643 (2d Dep't 1987). Section 240 states that "[n]o liability . . . shall be imposed on professional engineers . . . who do not direct or control the work other than planning and design." Massand's role went beyond planning and design. Massand is liable to Gravatt under § 240 of the New York Labor Law because it was the City's agent at the job site, contractually agreed to ensure that the work was performed in compliance with the Labor Law, and supervised and controlled the performance of the work and the condition of the job site. As found above, Massand had the contractual right, power, and duty to remedy unsafe practices and conditions at the job site, and on occasions exercised that responsibility. Massand gave safety orders to the men at the 145th Street Bridge and the men obeyed them. The exception to § 240 liability for engineers who do not direct or control the work does not apply to Massand at the 145th Street Bridge job site.

In the recent case of *Rizzuto v. L.A. Wenger Contracting Co., Inc.*, 91 N.Y.2d 343, 670 N.Y.S.2d 816, 693 N.E.2d 1068 (1998), the Court of Appeals reversed decisions that granted summary judgment on the issue of supervision and control. The plaintiff brought claims against Wenger under §§ 200 and 241(6) of the Labor Law, and alleged that Wenger "retained supervision and control of the construction . . . ." 91 N.Y.2d at 347, 670 N.Y.S.2d at 818, 693 N.E.2d at 1070.

The lower courts dismissed the § 200 claim against Wenger because the "evidence failed to establish that the general contractor exercised supervisory control over the construction site or the work activity bringing about the injury." 91 N.Y.2d at 347, 670 N.Y.S.2d at 818, 693 N.E.2d

at 1070. (The § 241(6) claim was also dismissed). The Court of Appeals reversed. With respect to the issue of job site supervision and control raised by the § 200 claim, the Court concluded that there was sufficient evidence to allow a jury to decide whether the general contractor supervised and controlled the work.

In *Rizzuto*, the general contractor "interacted with the foreman to ensure that the physical work progressed in accordance with the plans, specifications and safety rules." 91 N.Y.2d at 352, 670 N.Y.S.2d at 821, 693 N.E.2d at 1073. Here, S&B regulated or coordinated use of the job site which fulfilled a "safety factor" for the benefit of the employees at the job site. 91 N.Y.2d at 352-53, 670 N.Y.S.2d at 821, 693 N.E.2d at 1073. Massand also performed this type of activity, *i.e.*, it supervised the work and directed the workers to take safety precautions. It also had this duty under the contract.

In *Rizzuto*, the Court of Appeals also noted that "it is inferable that the defendant knew or should have known of the danger to the plaintiff" caused by working conditions at the job site. 91 N.Y.2d at 353, 670 N.Y.S.2d at 821, 693 N.E.2d at 1073. Such evidence "would have permitted the jury to rationally conclude that defendant possessed the requisite supervisory control over that portion of the work activity bringing about the injury to enable it to prevent the creation of the unsafe condition or plaintiff's exposure to it." 91 N.Y.2d at 353, 670 N.Y.S.2d at 821, 693 N.E.2d at 1073. Gravatt established that Massand knew or should have known of S&B's hazardous practice of mixing new and old material on the same barge, and knew or should have known of the dangerous use of timber tongs.

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The Gravatts are Entitled to Recovery Against S&B Under the LHWCA and Maritime Law

S&B was negligent and is liable to Gravatt under Section 905(b) of the LHWCA.

Section 905(b) provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. . . .

The 905(b) negligence action against the vessel was created by Congress when it amended the LHWCA in 1972. *See Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981). With the 1972 amendments, Congress increased the benefits payable to an injured worker, abolished the worker's strict liability cause of action against the vessel, and insulated the employer from third party liability to the vessel for the worker's injury. *See Id.* at 165. In this case, S&B acted as a "dual capacity" vessel owner, both as a vessel owner and as Gravatt's employer. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), the Supreme Court held that a dual capacity employer is liable in tort for injuries sustained by its employees on its vessels. Having determined

that vessels are liable to longshore and harbor workers for negligence, Congress left it to the courts to determine the contours of vessel negligence through the ordinary process of litigation. *See Scindia*, 451 U.S. at 165-66. *Scindia* held that vessel liability under § 905(b) arises in three circumstances:

> (1) The owner is liable if, on turning over the ship to the stevedore, it fails to warn of hidden defects which the owner should have known about. This is known as the "turn over duty."
>
> (2) The owner is liable for injury caused by hazards under the control of the ship. This is the "active control duty."
>
> (3) The owner is liable if it fails to intervene in the stevedore's operations when the owner has actual knowledge both of the hazard and that the stevedore, in the exercise of "obviously improvident" judgment, means to continue to work notwithstanding and, therefore, cannot be relied on to remedy the danger. This is the "duty to intervene."

According to S&B, it was a negligent "employer," not a negligent "vessel owner," and was entitled to rely on itself as an expert stevedore, and its "expertise" as stevedore insulated it from liability under § 905(b). However, in this Circuit, a dual capacity defendant is liable in its capacity as vessel owner for failing to provide workers aboard the vessel with a safe place to work. *See Fanetti v. Hellenic Lines, Ltd.*,

678 F.2d 424 (2d Cir. 1982); *Napoli v. [Transpacific Carriers, Etc.] Hellenic Lines*, 536 F.2d 505 (2d Cir. 1976). In *Fanetti*, the Second Circuit answered the question of whether a shipowner choosing to act as its own stevedore is entitled to insulation from liability, partial or total, which hiring an independent stevedore might otherwise afford. The Second Circuit answered that question in the negative, affirmed a verdict in favor of the plaintiff, and held that a shipowner choosing to act as its own stevedore is not entitled to insulation from liability under the LHWCA. S&B as vessel owner in this case, acted as its own stevedore, and any negligence on its part is actionable vessel owner negligence under 905(b).

In *Fanetti*, the Second Circuit relied on the reasons stated by the Court in *Napoli*, 536 F.2d 505, 508 (2d Cir. 1976):

> [A] charge which relieves a shipowner of liability for a dangerous condition which was "known to the stevedore or to any of its employees" is clearly inappropriate where the shipowner, itself, is the stevedore.

In his dissenting opinion in *Canizzo v. Farrell Lines, Inc.*, 579 F.2d 682, 689-90 (2d Cir. 1978), Judge Friendly reasoned:

> Where, as in [Napoli], there is no independent contractor, it is part of the ship's duty to exercise reasonable care to inspect its own workers' workplace, to remove grease spills, etc. In such a case there is no "independent contractor" with

> primary responsibility upon whom the ship may properly rely . . . . Things are very different when the longshoreman works for an independent stevedore who has primary responsibility for the workplace.

Judge Haight in *Fanetti* stated that trial judges should not be required:

> [T]o give juries instructions about the shipowner's right to rely upon an expert contractor who, in fact, was not there. The concept is schizophrenic and the predictable effect upon the jury one of bafflement. The Supreme Court itself, in the later case of *Scindia Steam & Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 58 L.Ed.2d 1 (1981), emphasized that "the legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty." *Id.* at 176, 101 S.Ct. at 1626. Implicit in that analysis is the existence of an independent, expert stevedore upon whom the shipowner's "justifiable expectation" may reasonably fall.

Fanetti, 678 F.2d at 430.

S&B again has urged the Court follow the First Circuit's holding in *Morehead v. Atkinson-Kiewit, J/V*, 97 F.3d 603 (1st Cir. 1996). The *Morehead* Court wrote, however, that:

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> [T]he duties of care described in *Scindia* should be applied in dual capacity cases *insofar as the facts allow*. To do so, a court may have to divide the employer-shipowner into a hypothetical independent employer and independent vessel owner, each separately holding the duties allocated under principles suggested in *Scindia*. A court may sometimes be assisted in the process by the defendant's internal employment arrangements assigning certain personnel to the "vessel" side of its operation. *On occasion, however, the duties and work arrangements pertaining to a suing harbor worker may be so foreign to those in Scindia's stevedoring context that Scindia's analysis will become no more than a point of departure.*

Morehead, 97 F.3d at 613 (emphasis added).

Even under *Morehead*, S&B as vessel owner had active control over the vessel and its cargo of debris and new material, and knew or should have known about the hazards created when commingling debris and new material and the potential for injury-causing accidents to occur, making it liable under *Scindia* standards. S&B did not exercise ordinary care in keeping its debris/material barge, crane barge, and vessel equipment in a condition that would permit its workers, who were not expert and experienced stevedores, to carry on cargo operations safely. *See, e.g.*, *Moore v. M.P. Howlett*, 704 F.2d 39 (2d Cir. 1983). S&B failed to fulfill its *Scindia* duty to intervene and correct the hazardous condition created by commingling the debris and good materials on

its barges and the use of timber tongs. Morehead also holds that the *Scindia* duty arising from active control over a hazardous condition is triggered when the dangerous condition is on the vessel itself. *See Morehead*, 97 F.3d at 613. S&B as vessel owner, had active control over the debris obstructing the new material that was loaded on the barge and breached *Scindia*'s "active control" duty in causing and permitting the debris and good material to be commingled, as well as for allowing timber tongs to be used to move debris.

S&B has contended that Gravatt's 905(b) claim is barred by the "fellow servant" rule, a defense not explicitly raised in the S&B pretrial order or at trial. Federal rule 8(c) requires a party to plead certain affirmative defenses, including "injury by fellow servant." Fed. R. Civ. P. 8(c), and therefore could be said to have been waived. *See Doubleday & Co. v. Curtis*, 763 F.2d 495, 503 (2d Cir. 1985). Further, the defense offered by S&B is not supported by the authorities.

The fellow servant rule arose in England in 1837, *i.e.*, during the Industrial Revolution, out of a "social philosophy and an attitude toward labor, which are long since outmoded." W. P. Keeton, *Prosser And Keeton On the Law of Torts*, 569 (5th ed. 1984) (hereinafter "Prosser").

> The rule that the employer was not liable for injuries caused solely by the negligence of a fellow servant first appeared in England in 1837, and almost immediately afterward in the United States . . . The explanation of the rule probably lay in the highly individualistic viewpoint of the

> common law courts, and their desire to encourage industrial undertakings by making the burden upon them as light as possible.
>
> The general rule thus declared was later restricted in a number of respects, as its hardship upon labor became apparent.

Prosser, at 571-72.

Section 905(b) contains a limited fellow servant defense:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . . . if such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer . . .

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The first sentence of 905(b) states the general rule that workers covered by the LHWCA can sue vessels for negligence. *See Guilles v. Sea-Land Service, Inc.*, 12 F.3d 381, 385 (2d Cir. 1993). By judicial interpretation, this sentence allows longshoremen and harbor workers to sue their employers who are also vessel owners. *Guilles*, 12 F.3d at 386 (citing *Jones*, 462 U.S. 523).

The second and third sentences of 905(b) allow the fellow servant defense to some of the negligence actions permitted against vessels in the first sentence of 905(b). *See Guilles*, 12 F.3d at 386.

Section 905(b) recognizes the fellow servant defense in four classes of workers: longshore workers/stevedores, ship builders, ship repairers, and ship breakers. *See Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 795 (2d Cir. 1979). "Section 905(b) bars any action against the shipowner by a longshoreman, repairman, or shipbuilder who is injured as a result of the negligence of other employees performing similar services." *Id.* at 795. Despite the defense, the vessel remains liable for the full amount of the loss if its negligence contributed to the injury. *Smith*, 604 F.2d at 795-96.

However, Gravatt does not fall into any of the four worker categories that permit the fellow servant defense. Gravatt was a carpenter, *i.e.*, a dockbuilder hired as a pile driver to work on a bridge and belonged to the carpenters union. Even if the defense applies, vessel owner negligence caused the accident. Gravatt was not a longshoreman, did not work for a stevedore, and was not hired to provide stevedoring services. Gravatt was not a ship builder, repairer, or breaker.

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S&B seeks to expand the fellow servant rule to cover workers who do not fall within one of the four classes of workers identified in 905(b). The Second Circuit refused to address this contention in *Smith*. "We need not now decide whether the § 905(b) exclusion applies to land-based personnel other than those in the three enumerated groups." *Smith*, 604 F.2d at 797. (*Smith* speaks of three enumerated groups, instead of four because it was written before 905(b) was amended in 1984).

Smith was decided in 1979, *i.e.*, before *Scindia* and *Fanetti* and before the 1984 amendments to § 905(b). The 1984 amendments altered 905(b) by narrowing the availability of negligence claims against vessels in certain dual capacity cases. Congress barred employees providing "shipbuilding, repairing, or breaking services" from suing the owner-employer in any capacity. In doing so, congress specifically stated that 905(b), as amended, should "not be construed to limit an employee's right to bring a cause of action, except in the circumstances indicated within the language." H.R. Rep. No. 98-570(1) at 7 (1984), reprinted in 1984 U.S.C.C.A.N. 2734, 2741. Congress does not expect courts to expand the fellow servant rule by implication.

The Second Circuit has read the 1984 amendments to 905(b) as a limitation on the classes of employees precluded from suing dual capacity owners.

> The 1984 change now in effect, preventing in all circumstances shipbuilders and repair personnel from recovering for negligence from an employer-vessel, shows that Congress knew how to preclude

> a class of employees from being able to sue an employer-vessel if it chose to do so. By stipulation, it is agreed that Guilles [the plaintiff] is not among that class, and that class to which he belongs, harborworkers, is not specifically precluded form the cause of action.

Guilles, 12 F.3d at 386 (footnote omitted).

As a harborworker, *i.e.*, a carpenter or dockbuilder, Gravatt is not specifically precluded from suing his vessel owning employer. The 1984 amendments to 905(b) and the Second Circuit's decision in *Guilles* defeat S&B's attempt to expand the fellow servant defense into classes of workers not clearly identified in 905(b).

Here, in any case, Gravatt is entitled to recover against S&B because the injuries were caused by S&B in its capacity as vessel owner. *See Smith*, 604 F.2d at 796-97.

In *Smith*, the plaintiff's decedent was a diver/ship repairer (one of the categories of workers subject to the fellow servant rule) who drowned while attempting to perform an underwater survey of a dredge. The district court dismissed 905(b) claim because it:

> considered the case to be governed by the clause in § 905(b) which immunizes a shipowner from a damage action by an employee who is injured while doing longshoring, ship building or repair work as a result of the negligence of other

> employees of the vessel involved in the same activities.

Smith, 604 F.2d at 793.

Even if a fellow servant caused the injury, the injured worker may still recover in full from the vessel owner-employer if the owner-employer contributed to the cause of the injury. *See id.* at 795-96. In this connection, under *Smith*, the court must determine whether the negligent acts were committed by employees acting for the vessel.

In *Smith*, the district court concluded that the worker died as a result of the negligence of co-workers who were engaged in the same ship repairing activity. *Id.* at 795-96. The Court of Appeals reversed:

> The acts and omissions found to constitute actionable negligence all took place prior to the actual dive and were akin to a failure to provide a safe place to work. The absence of a rescue plan, the improper placement of emergency apparatus, and the failure to provide a ladder or platform were all defects in the general operation of the tug, and it is merely fortuitous that they came to light during a dive that was part of a repair program. Furthermore, it cannot be said that the responsibility for providing a safe vessel from which to dive was at any time delegated to employees acting primarily as repairmen. Mutch, the president of Eastern, was in command throughout the operation, and may be charged

> with knowledge of the deficiencies that led to the accident. Although Eastern might have escaped liability if it had surrendered control over the operation to a subcontractor that could supply and supervise its own divers, that course was not chosen.

604 F.2d at 796 (footnote omitted).

S&B's negligence preexisted the date of the injury. The decision to mix debris and new material and to use timber tongs as hoisting equipment was made by S&B's supervisory personnel and were consistent practices adopted prior to the accident.

Under *Fanetti*, 678 F.2d at 430, when an owner-employer does not use an independent stevedoring contractor to load, unload, or restow cargo, the owner-employer is liable to the worker for injuries caused by the owner-employer's negligence. There is no need to determine whether the acts of negligence are attributable to the owner-employer in its capacity as owner or as employer.

S&B as a dual capacity employer, acted as a vessel owner under *Fanetti*, and is, therefore, liable for the negligent acts and dangerous conditions which caused Gravatt's injuries.

Gravatt's claims against the City and Massand are not governed by maritime law. However, even if, as the defendants allege, maritime law applied, the City and Massand would be negligent and liable to Gravatt under general maritime law. *See Kermarec v. Compagnie Generale*

Transatlantique, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959). They exercised supervision and control over the job site, were on notice of unsafe conditions and practices generally, the improper use of timber tongs, the hazardous mixing of debris and new material on the same barge and failed to train their men properly.

Gravatt Is Not Liable For Contributory Negligence

As the Opinion found and the testimony established, and as stated in the companion opinion, Gerhard Holzheuer ("Holzheuer") was the S&B foreman directly supervising Gravatt and his co-worker, Thomas Liming ("Liming"), and Gravatt and Liming were complying with Holzheuer's direction to use timber tongs to move old pilings in order to gain access to a new draft of lumber which was to be moved. The old pilings slipped, the load fell, and Gravatt was consequently struck as set forth in the Opinion at pages 24-26.

A correct interpretation of the cases cited in the Opinion compels the conclusion that an injured worker following the orders of his supervisor is not contributorily negligent, and any award for damages should not thereby be reduced as a consequence of his acts.

In *Fuszek v. Royal King Fisheries*, 98 F.3d 514 (9th Cir. 1996), the plaintiff, a Jones Act seaman, was injured on board a fishing vessel while operating a fish processing machine. The plaintiff reached into the machine while it was operating (a dangerous practice implemented by his employer) and seriously cut his hand. The Court reduced plaintiff's award

by twenty-five percent for contributory negligence. The Court of Appeals in reversing held that the plaintiff's recovery should not be reduced because the vessel owner maintained the vessel's equipment in violation of safety regulations. Although *Fuszek* involved a seaman protected by the Jones Act rather than a harbor worker protected by the LHWCA, it stands for the principle that a worker is not liable for injuries caused by following orders, as does *Simpson v. Royal Rotterdam Lloyd*, 225 F. Supp. 947 (S.D.N.Y. 1964). There the plaintiff was a longshoreman who was injured on the defendant's vessel while unloading cargo in Brooklyn. He fractured his ankle when a 100 pound tin ingot fell on his foot during unloading operations. The Honorable Wilfred Feinberg, then a District Judge, stated "There was no contributory negligence on the part of the plaintiff. He was in the hold working *pursuant to instructions*." 225 F. Supp. at 950 (emphasis added).

Based on the facts found above and the authorities set forth, no contributory negligence can be attributed to Gravatt who was following a direct order of a supervisor causally related to his injury.

Gravatt is Entitled to Compensatory Damages from the City and Massand

Based on the facts found above Gravatt is entitled to compensatory damages from S&B and Massand. As against Massand, Gravatt's compensatory damages are calculated according to New York State Law. Under New York law, the trier of fact is to calculate lost income without reduction to present value and without deducting for income taxes.

CPLR § 4111(f); *Lanzano v. New York*, 71 N.Y.2d 208, 524 N.Y.S.2d 420, 519 N.E.2d 331 (1988), *recons. den.*, 71 N.Y.2d 890, 527 N.Y.S.2d 772, 522 N.E.2d 1070 (1988).

Gravatt is Entitled to an Award for Pain and Suffering

Based on the facts found above Gravatt is entitled to an award for pain and suffering. As discussed above, Gravatt's past pain and suffering would be fairly compensated by an award of $300,000. He will also endure pain and suffering in the future for the next twenty-five years for which he should be compensated in the amount of $200,000.

Gravatt is Entitled to Punitive Damages an Against Massand and S&B

The parties do not dispute that punitive damages are not available against the City. *See Sharapata v. Town of Islip*, 56 N.Y.2d 332, 437 N.E.2d 1104, 452 N.Y.S.2d 347 (1982). The issue remains as to whether Gravatt is entitled to punitive damages against Massand and S&B.

Under New York State law, punitive damages are available against parties whose acts or omissions amount to "willful or wanton conduct which demonstrates a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard. . . ." *Dubecky v. S2 Yachts, Inc.*, 234 A.D.2d 501, 502, 651 N.Y.S.2d 602, 604 (1996) (quoting, *Home Ins. Co. v. American Home Prods. Corp.*, 75 N.Y.2d 196, 203-204, 551 N.Y.S.2d 481, 485-86, 550 N.E.2d 930, 934-35 (1990)). Federal law is similar. Under federal law, punitive damages are available against parties

whose actions constitute "gross negligence, or actual malice or criminal indifference which is the equivalent of reckless and wanton misconduct." *In Re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972); *CEH Inc. v. F/V SEAFARER*, 70 F.3d 694, 699 (1st Cir. 1995) (punitive damages available against those who show a conscious disregard for the rights of others).

Massand and S&B demonstrated a reckless disregard for the safety of the construction workers at the 145th Street Bridge job site. They knew that the men were working unsafely. S&B's superintendent told the City's project engineer, who raised safety concerns, that the men worked dangerously because that is how the job got done. The superintendent told the crane operator that if they obeyed the safety rules contained in the safety memos, they would never finish the work. The shop steward at the job site had complained about safety to both Massand and S&B. Massand closed its eyes to the dangerous activities and conditions at the job site. Although it contractually assumed responsibility for the safety of the workers, Massand did nothing at all to learn about construction site safety. Even after Massand became aware that too many personnel accidents were occurring at the job site, it did not implement any changes or improvements to safety supervision or even take the basic step of training its men.

While the complete disregard for safety of both S&B is inexcusable, S&B is the more culpable party and its conduct, being reckless and wanton, merits an award of punitive damages. Unfortunately, however, the law prohibits an award of punitive damages against S&B in this case.

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Massand and S&B rely on the reasoning of the Supreme Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and dicta in the Second Circuit's decision in *Wahlstrom v. Kawasaki Heavy Industries Ltd.*, 4 F.3d 1084 (2d Cir. 1993), for the proposition that punitive damages are not available in cases brought under general maritime law. While punitive damages against S&B are not appropriate in the instant case, Massand and S&B overstate the Supreme Court's holding in *Miles*.

In *Miles*, the Court held, *inter alia*, that damages recoverable in an action for the wrongful death of a seaman do not include loss of society. *See Miles*, 498 U.S. at 37. In reaching this conclusion, the Court articulated principles of uniformity relevant to wrongful death actions, and more generally, to maritime tort law, which have moved subsequent courts to limit recovery in other similar contexts. *See e.g.*, *CEH, Inc. v. FV Seafarer*, 148 F.R.D. 469, 472 (D.R.I. 1993) (collecting cases). The Supreme Court's decision in *Miles*, however, does not enunciate an absolute bar to recovery of punitive damages in all general maritime cases. Indeed, *Miles* does not signify a call for "universal uniformity of maritime tort remedy," but rather "emphasizes the importance of uniformity in the face of applicable legislation." *CEH, Inc. v. FV Seafarer*, 70 F.3d at 700. The concern expressed in *Miles* was not with respect to nonpecuniary damages in maritime cases in general, but with inconsistency with statutory law: "[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance . . . . [and] must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Miles*, 498 U.S. at 27. As the Supreme Court

later held in *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996), "[w]hen Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is no cause for enlargement of the damages statutorily provided." 516 U.S. at 215.

It would be anomalous under these facts to conclude that a remedy under general maritime law and state statute and punitive damages are available against S&B for the reasons set forth in the companion opinion and repeated here.

The issue of the availability of punitive damages has now been more precisely illuminated by the parties. The issue is difficult and close, and distinguished judges in this district have reached contrary results, the Honorable Bernard Newman concluding that punitive damages are not available in *Cochran v. A/H Battery Associates*, 909 F. Supp. 911, 920-23 (S.D.N.Y. 1995) (Judge Newman also concluded the proof did not support the punitive damage claim), and the Honorable Jed B. Rakoff reaching the same conclusion in *O'Hare v. Celebrity Cruises, Inc.*, 979 F. Supp. 254 (S.D.N.Y. 1997), while the Honorable Allen G. Schwartz denied a motion to strike a similar punitive damage claim in a maritime cause in *Taylor v. Costa Cruises, Inc., et al.*, 90 Civ. 2630 (AGS), unreported opinion, filed March 14, 1996, relying on his analysis of *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).

Both the Gravatts and S&B agree on the legal issue, *i.e.*, whether an award of punitive damages is permissible under general maritime law in a case involving non-fatal injuries to a harbor worker. S&B contended that *Miles v. Apex Marine*

Corp., 498 U.S. 19 (1990) and cases interpreting it, including *Wahlstrom v. Kawasaki Heavy Industries, Ltd.*, 4 F.3d 1084 (2d Cir. 1993), bar a punitive damages recovery under the general maritime law, and in the Opinion it was concluded that under the LHWCA the same conclusion should be reached. However, the Opinion also concluded that *Miles* does not preclude an award of punitive damages on all claims arising under the general maritime law.

On closer examination, it is now concluded *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Kawasaki*, 4 F.3d 1084, do not compel acceptance of S&B's argument. *Kawasaki* involved a wrongful death action of a pleasure boat operator, *i.e.*, not a traditional seaman or harbor worker. This Court concluded in the Opinion:

> Massand and S&B rely on the reasoning of the Supreme Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and dicta in the Second Circuit's decision in *Wahlstrom v. Kawasaki Heavy Industries Ltd.*, 4 F.3d 1084 (2d Cir. 1993), for the proposition that punitive damages are not available in cases brought under general maritime law. While punitive damages against S&B are not appropriate in the instance case, Massand and S&B overstate the Supreme Court's holding in *Miles*.
>
> In *Miles*, the Court held, *inter alia*, that damages recoverable in an action for the wrongful death of a seaman do not include loss of society. *See Miles*, 498 U.S. at 37. In reaching this

conclusion, the Court articulated principles of uniformity relevant to wrongful death actions, and more generally, to maritime tort law, which have moved subsequent courts to limit recovery in other similar contexts. *See e.g., CEH, Inc. v. FV Seafarer*, 148 F.R.D. 469, 472 (D.R.I. 1993) (collecting cases). The Supreme Court's decision in *Miles*, however, does not enunciate an absolute bar to recovery of punitive damages in all general maritime cases. Indeed, *Miles* does not signify a case for "universal uniformity of maritime tort remedy," but rather "emphasizes the importance of uniformity in the face of applicable legislation." *CEH, Inc. v. FV Seafarer*, 70 F.3d at 700. The concern expressed in Miles was not with respect to nonpecuniary damages in maritime cases in general, but with inconsistency with statutory law; "[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance . . . [and] must be vigilant not to overstep the well-considered boundaries imposed by federal legislation." *Miles*, 498 U.S. at 27. As the Supreme Court later held in *Yamaha Motor Corp. U.S.A. v. Calhoun*, 516 U.S. 199 (1996), "[w]hen Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, there is no cause for enlargement of the damages statutorily provided." 516 U.S. at 215.

Opinion at pages 74-75.

The anomaly of allowing punitive damages against Massand and not against S&B was recognized but it was

concluded that the LHWCA, as a worker's compensation scheme, compelled this result. However, the legislative history of the LHWCA casts doubt on that conclusion. Congress apparently anticipated that the 905(b) action would place the vessel owner in the same position as a land-based third-party.

> The purpose of the [1972] amendments [to the LHWCA] is to place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness," "non-delegable duty," or the like.

H.R. Rep. 92-1441, at 4703 (1972).

It thus appears that Congress did not intend to create the anomalous result reported in the Opinion. Indeed, in *Miles*, a seaman was murdered aboard ship in state territorial waters. A claim for both survival and wrongful death damages alleged negligence under the Jones Act and for unseaworthiness under general maritime law.

The Supreme Court held that a non-dependent parent cannot recover loss of society damages and that the decedent's lost future income is not recoverable to the estate. The Supreme Court ruled that the applicable federal statutes, Death on the High Seas Act, 46 U.S.C. § 761 *et seq*.

("DORSA") and the Jones Act, 46 U.S.C.A. § 688, limit damages to "pecuniary loss" in seamen's wrongful death and survival actions and, thus, precluded the murdered seaman's mother from recovering "non-pecuniary loss, such as loss of society," in a general maritime law action. *Miles*, 498 U.S. at 20, *quoting*, *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974).

The Second Circuit in *Kawasaki*, where non-dependent parents of a recreational boater sued for non-pecuniary damages held that non-pecuniary loss of society damages were not available to non-dependent parents under general maritime law. Turning to punitive damages, the Second Circuit held that punitive damages, like loss of society, are "non-pecuniary" and, therefore, are unrecoverable in a wrongful death action based on general maritime law. The Court stated:

> We are in general agreement with the view that plaintiffs who are not allowed by general maritime law to seek nonpecuniary damages for loss of society should also be barred from seeking non-pecuniary punitive damages.

446 U.S. 274, *Kawasaki*, 4 F.3d at 1094.

The Gravatts contend that the corollary to this rule is that plaintiffs who are entitled to seek non-pecuniary damages for loss of society should be allowed to seek non-pecuniary punitive damages, citing *American Export Lines v. Alvez*, 446 U.S. 274 (1980) where it was held that non-pecuniary loss of society damages are available to the spouse of a harbor worker injured in state territorial waters:

Appendix B

> The question in this case is whether general maritime law authorizes the wife of a harbor worker injured *nonfatally* aboard a vessel in state territorial waters to maintain an action for damages for the loss of her husband's society. We conclude that general maritime law does afford the wife such a cause of action.

Alvez, 446 U.S. at 275-76.

In the interest of congruence between state and federal law under the authorities cited above, and the requirements of justice under the particular facts of this case driven by questions of coverage, the conclusion stated in the Opinion must be amended to grant judgment against S&B on behalf of Gravatt on his claim for punitive damages.

Having previously concluded Massand's liability to be $200,000 and S&B to have more culpability than Massand (Opinion, pages 75-76), an award of $400,000 in punitive damages against S&B is appropriate. As set forth in the Findings of Fact in the Opinion, while Massand's principal dereliction was its failure to comply with contractual and statutory requirements and to provide inspection, particularly at the time of the action (Opinion, pages 14-19, 24), S&B's reckless conduct included not only the failure to meet the relevant safety requirements, but the particular instruction to use an unsafe procedure which resulted in the injury to Gravatt (Opinion, pages 6-12, 27-30).

As to Massand, under the facts found above, Gravatt has met his burden of proof under both state and federal law.

Appendix B

Massand's deliberate indifference to the safety requirements imposed upon it by law and contract constitutes wanton and malicious conduct. Accordingly, Massand is liable for punitive damages in the amount of $200,000. *See In Re Marine Sulphur Queen*, 460 F.2d at 105; *Dubecky*, 234 A.D.2d 501, 502, 651 N.Y.S.2d 602, 604.

The City is Entitled to Indemnity from S&B and Massand Under Their Contracts

For the reasons set forth in the Opinion of April 6, 1998, the City is entitled to contractual indemnity.

Massand is Not Entitled to Contribution from S&B

While both S&B and Massand bear responsibility for the damages to Gravatt and Mrs. Gravatt resulting from their torts, Massand, who is less culpable than S&B, has no right of contribution against S&B.[3] Pursuant to Section 11 of the Workers' Compensation Law, as amended on September 10, 1996, third parties are barred from seeking indemnification or contribution from an injured plaintiff's employer absent a showing that that employee sustained a "grave" injury as defined by the statute. *See* Workers' Compensation Law § 11; *Majewski v. Broadalbin-Perth Central School Dist.*, 696 N.E.2d 978, 91 N.Y.2d 577, 673 N.Y.S.2d 966 (1998). Section 11 defines "grave" injury to include:

> death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of

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3. This Court has held previously that Massand is not entitled to indemnity against S&B. *See* 1998 WL 171491 at *22.

> multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of an ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Here, there is no dispute that Gravatt did not suffer a "grave" injury as defined by the statute.

In addition, as noted in the April 6 Opinion, the exclusivity provision in § 905(a) prohibits tort-based contribution: "[O]nce an employer fulfills its obligations under the Act by paying out benefits to the injured LHWCA employee, further tort-based contribution from the employer is foreclosed." 1998 WL 171491 at *22 (quoting *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95, 98 (2d Cir. 1991)).

The Terms of the Judgment

Gravatt is entitled to interest at nine (9%) percent on the award from the date of this Court's April 6, 1998 decision on summary judgment. *See Love v. State of New York*, 78 N.Y.2d 540, 577 N.Y.S.2d 359, 583 N.E.2d 1296 (1991).

Once the judgment is entered and the precise pre-judgment interest calculation is made to determine the exact value of the judgment, Gravatt is entitled to post-judgment interest at nine (9%) percent per annum until it is paid. CPLR § 5004. This rate follows the rate used by the State of New

York. It is higher than the rate earned on United States Treasury Bills since January 31, 1996, but certainly less than the return a prudent investor would have earned since that date.

Gravatt's 905(b) action against S&B is governed by federal law, which requires the reduction of Gravatt's economic damages to present value based on net income. Federal law considers the tax consequences of an award and uses net income to calculate lost future income. *See Fanetti*, 678 F.2d at 431. "Focusing upon after-tax earnings is an exercise in economic fairness; by this decision we extend it at least to all federal law claims for future lost wages." *Id.* at 431. State law, however, does not give the tortfeasor the benefit of the victim's tax savings. *See Louissaint v. Hudson Waterways Corp.*, 111 Misc.2d 122, 443 N.Y.S.2d 678 (1st Dep't 1981) (analyzing cases). "[A] deduction of income taxes from future earnings is not called for in a personal injury case applying state law." *Hudson Waterways*, 111 Misc.2d at 128, 443 N.Y.S.2d at 682. Gravatt is also entitled to an award for pain and suffering under federal law.

Under federal law, Gravatt is entitled to pre-judgment interest on the award of damages from the date of injury to the entry of judgment at a rate left to the discretion of this Court. *See McCrann*, 803 F.2d 771; *Taliercio v. Compania Empressa Lineas Argentina*, 761 F.2d 126, 129 (2d Cir. 1985) The Court has elected to impose a rate of nine (9%) percent per annum. After entry of judgment, Gravatt is entitled to post-judgment interest pursuant to 28 U.S.C. § 1961(a).

The defendants are liable to Mrs. Gravatt for her damages for loss of consortium. As against the City and Massand,

she is entitled to pre-judgment interest on that amount at nine (9%) percent per annum from April 6, 1998. As against S&B she is entitled to pre-judgment interest on that amount at nine (9%) percent per annum from January 31, 1996. She is entitled to post-judgment interest against the City and Massand at nine (9%) percent from the date of entry of judgment and she is entitled to post-judgment interest against S&B pursuant to 28 U.S.C. § 1961(a) from the date of entry of judgment.

As to the damages resulting from joint tort liability and interest thereon, the defendants are jointly and severally liable.

Conclusion

Based upon the revised revised findings of fact and conclusions of law set forth above, the Gravatts are entitled to judgment against the defendants, and the City is entitled to indemnity against S&B and Massand.

Settle judgment in accordance with this opinion as of June 15, 1999, upon ten (10) days notice.

It is so ordered.

s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

New York, N. Y.
May 24, 1999

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 26, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of October two thousand.

Dkt. No. 99-7898

STEVEN GRAVATT and DELORES GRAVATT,

Plaintiffs – Appellees,

v.

THE CITY OF NEW YORK,

Defendant-Cross-Claimant,

SIMPSON & BROWN, INC.,

Defendant-Cross-Defendant-Appellant,

Appendix C

N. MASSAND, P.E., L.S., P.C.,
aka Nanik Massand, P.C.,

Defendant-Cross-Claimant-Cross-Defendant,

BARGE "ABC" AND BARGE "DEF", their engines, boilers, tackles, etc. in rem,

Defendant-Cross-Defendant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellee's Steven Gravatt and Delores Gravatt.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney